IN THE

# Supreme Court of the United States

October Term, 1964

No. [redacted] 4

MARC D. LEH, individually and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,

*Petitioners,*

*vs.*

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

RICHARD G. HARRIS,
8705 La Tijera Boulevard,
Los Angeles, Calif. 90045.
*Attorney for Petitioners.*

*Of Counsel:*
MAXWELL KEITH,
111 Sutter Street,
San Francisco 4, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 2, 1964.

## Citations to Opinions Below.

The opinion of the District Court in granting summary judgment against the petitioners is reported at 208 F. Supp. 289 (1962), and is attached hereto as Appendix C.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 330 F. 2d 288 (1964), and is attached hereto as Appendix A.

## Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 2, 1964 (Appendix B). The time for filing this petition for writ of certiorari was on June 29, 1964, extended to and including August 1, 1964 (Appendix E). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## Questions Presented.

1. Is an action for treble damages under the antitrust laws an action for a penalty?

2. Is resort to be had to state or federal law for "characterization" of the cause of action created by 15 U. S. C. §15 as penal or compensatory?

3. If resort is to be had to state law for such "characterization," is the law of the state a question of fact to be reviewed on appeal under the "clearly erroneous" test, or a question of law?

4. If resort is to be had to state law for such "characterization," is a decision of a Superior Court of the State of California binding upon federal courts?

5. If resort is to be had to state law for such "characterization," and the law of the state is that reference is to be had back to federal law, is not the federal "characterization" binding?

6. Whether the statute of limitations was tolled by Section 5 of the Clayton Act during the pendency of the Government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C)?

## Statutes Involved.

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. Sections 1 and 2; Section 4 of the Clayton Act, 15 U. S. C., Section 15; and Section 5 of the Clayton Act, 15 U. S. C., Section 16, as amended, 15 U. S. C., Section 16(b) (1955).

## Statement of the Case.

Petitioners by complaint filed September 28, 1956, alleged that a conspiracy was initiated among respondents in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that respondents then and thereafter combined to exclude petitioners from the wholesale distribution and sale of gasoline, both by controlling sales to petitioners and by eliminating petitioners' sources of supply [R. 2-27]. It is conceded that petitioners' cause of action accrued no later than February, 1954, and that the applicable statute of limitations commenced to run at that time, unless suspended under Section 5 of the Clayton Act (15 U. S. C. §16, as amended, 15 U. S. C. §16(b) (1955)) by a similar proceeding "instituted by the United States."

It is further conceded that the four-year limitations period with respect to private causes of action under the anti-trust laws is inapplicable to a cause accruing in 1954. Petitioners contend that the similar proceeding which during its pendency suspended the applicable statute of limitations was *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C) [R. 1136-1158].

Respondents by answer denied petitioners' allegations and asserted by way of affirmative defense that peti-

tioners' action was barred by the applicable statute of limitations [R. 98-157]. Subsequently respondents moved for a summary judgment of dismissal upon the defense of time-bar [R. 612-616; 1182-1183], which motion was granted [1209-1227], and from which an appeal was prosecuted to the United States Court of Appeals for the Ninth Circuit.

The District Court held that the applicable statute of limitations was California Code of Civil Procedure §340(1) providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, . . ." [R. 1209-1227]. The Ninth Circuit affirmed, stating that the holding of the District Court cannot "be held clearly erroneous." (App. A, p. 29) (330 F. 2d at 301).

## REASONS FOR GRANTING THE WRIT.

### I.

### The Decision of the Court Below Is in Total Conflict With Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906), and the Purposes of Congress in Enacting the Anti-Trust Laws.

An action to recover damages resulting from a violation of the Sherman Act is not an action to recover a penalty.

*Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906).

Throughout his opinion Judge Barnes mounts an increasing attack upon the *Chattanooga* holding. In footnote 4 of his opinion (330 F. 2d at 290) he points out that only two cases were cited in *Chattanooga* to

support the Court's conclusion. In footnote 7 (330 F. 2d at 293-294) he points out that the Second Circuit distinguished *Chattanooga* in *Bertha Building Corp. v. National Theatres Corp.*, 269 F. 2d 785, 788-789 (2nd Cir. 1959). At page 19 of the opinion (Appendix A) (330 F. 2d at 296) he refers to the discussion by the Ninth Circuit in *Flintkote Co. v. Lysfjord,* 246 F. 2d 368, 398 (1957), of the penalty theory lying behind treble recovery in anti-trust litigation. Finally, at pages 23 and 24 of the opinion (Appendix A) (330 F. 2d at 298-299), *Chattanooga* is repudiated:

> "But no matter the reason, the amount awarded over and above compensation is to penalize—to do more than compensate. * * * What is recovered under Section 7 of the Sherman Act (15 U.S.C. §15) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. §6) The treble damage provision cannot be clasified as exemplary damages, in the ordinary legal sense of that phrase, for in antitrust the jury has no authority or discretion to decline to award, or as to how much to award, once the compensatory amount of damages is determined. But we insist it has some attributes of a penal statute."

The above-quoted language is significant. Though starting out "to prognosticate . . . the result at which a state court would arrive" (Appendix A, p. 4) (330 F. 2d at 290), all pretense is gone at page 24 of the opinion (Appendix A) (330 F. 2d at 299) and the personal pronoun is used. The opinion cannot be viewed otherwise than as a direct repudiation of the holding of this Court in *Chattanooga, supra.*

## II.

## The Decision of the Court Below Is in Conflict With the Fundamental Concept That a Cause of Action Arising Under Federal Law Must Be Uniform Wherever the Action May Be Brought.

The ultimate question presented by respondents' motion for a summary judgment of dismissal upon the defense of time-bar was whether to apply the California statute of limitations governing actions to recover "for a penalty or forfeiture." The answer to that question turned upon whether the private anti-trust action was "penal" or not. But the threshold question, involving a fundamental question of federalism, was whether California law or federal law was to determine the "nature" of, or "characterize" as penal or non-penal, the private anti-trust cause of action. The District Court decided to use California law (298 F. Supp. at 292). On appeal petitioners adopted this as the correct approach to the problem. However, after the briefs were filed, but before oral argument, this Court handed down its decision in *Simler v. Connor,* 372 U. S. 221, 83 S. Ct. 609, 92 L. Ed. 2d 691 (1963). At oral argument petitioners asked the Ninth Circuit Court to consider the problem without reference to petitioners' concession in view of the decision of this Court in *Simler v. Connor, supra.* Amici Curiae also lodged with the Court after the oral argument a motion for leave to file a brief in support of the proposition that resort must be had to federal law for "characterization" of the cause of action created by 15 U. S. C., Sec. 15. Though the motion was denied, the cases the Amici parties cited with the motion were considered by the court (Appendix A, p. 3, fn. 2) (330 F. 2d at 289, fn. 2). The Court held that

resort must be had to state law to determine the "nature" of the private antitrust cause of action as penal or nonpenal. This placed the Ninth Circuit in conflict with itself and with the fundamental concept that a cause of action arising under federal law must be uniform wherever the action may be brought.

**A. The Ninth Circuit Is in Conflict With Itself.**

In *Smith v. Cremins,* 308 F. 2d 187, 189 (9th Cir. 1962), the Ninth Circuit held that:

> "In determining which period of limitation to apply to an action under a particular federal statute, the federal court accepts the state's interpretation of its own statutes of limitations, *but determines for itself the nature of the right conferred by the federal statute.*" (Emphasis added.)

The Ninth Circuit in *Smith v. Cremins, supra,* relied in part upon an antitrust case, *Moviecolor Limited v. Eastman Kodak Co.,* 288 F. 2d 80 (2nd Cir. 1961), cert. den., 368 U. S. 821, 82 S. Ct. 39, in which the Court said at page 83:

> "In dealing with federally created claims both federal and state law must sometimes be consulted to determine whether the borrowed period has run. Thus, when a state has established different periods of limitation for different types of actions, a federal court enforcing a federally created claim *looks first to federal law to determine the nature of the claim* and then to state court interpretations of the statutory catalogue to see where the claim fits into the state scheme." (Emphasis added.)

See also:

*Leonia Amusement Corp. v. Loew's Inc.,* 117 F. Supp. 747, 751-752 (S.D. N.Y. 1953).

As the court below points out in footnote 4 to its opinion (App. A, p. 5, fn. 4) (330 F. 2d at 290, fn. 4), it has stated in so many words that, "An action to recover damages resulting from a violation of the Sherman Anti-trust Act is not an action to recover a penalty."

*Hicks v. Bekins Moving & Storage Co.*, 87 F. 2d 583 (9th Cir. 1937).

The decision of the court below, however, looks to state law to determine the nature of the federally created claim being enforced in federal court and insists, in so many words, that an action to recover damages resulting from a violation of the Sherman Anti-Trust Act "has some attributes of a penal statute." (App. A, p. 25) (330 F. 2d at 299).

*Simler v. Connor*, 372 U. S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963), was a diversity case in which the cause of action was created by Oklahoma law. This Court nonetheless held that federal law, not state law, determined whether the cause of action was "equitable" or "legal". If this is true of a cause of action created entirely by state law, how much more so should it be true that federal interpretation of a federal law should govern its "characterization".

**B. A Cause of Action Arising Under Federal Law Must Be Uniform Wherever the Action May Be Brought.**

Federal interpretation of the federal law will govern, not state law.

*Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U. S. 448, 457, 77 S. Ct. 912, 918, 1 L. Ed. 2d 972, 981 (1957).

The problem here concerns the enforcement in a federal Court of a right created by Congress; and federal law, not state law, must control in determining the rules governing enforcement in federal courts of rights and remedies created by federal statutes.

*Holmberg v. Armbrecht*, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946);

*Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U. S. 173, 63 S. Ct. 172, 87 L. Ed. 165 (1942);

*Local 19, Warehouse Union v. Buckeye Cotton Oil Co.*, 236 F. 2d 776, 780-781 (6th Cir. 1956), cert. den., 354 U. S. 910, 77 S. Ct. 1293, 1 L. Ed. 2d 1428 (1957).

This court said in *Sola Elec. Co. v. Jefferson Elec. Co., supra*, 317 U. S. at page 176, 63 S. Ct. at page 173, 87 L. Ed. at page 168:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. * * * When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."

The decision of the court below is in direct conflict with the concept of uniformity. Recognizing "the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions" (App. A, p. 15) (330 F. 2d

at 295), the court attempts "to prognosticate . . . the result at which a state court would arrive . . ." (App. A, p. 4) (330 F. 2d at 290). An opinion under which a private antitrust cause of action may be penal in California, not penal under the federal system, and may or may not be penal in the forty-nine other states, is inherently incongruous.

In *Englander Motors, Inc., v. Ford Motor Company,* 293 F. 2d 802 (6th Cir. 1961), the Court was faced with the identical problem here presented. The Sixth Circuit held at page 806 that it was clear "that under federal law private actions for treble damages under the anti-trust laws are not regarded as penal in nature, but as compensation."

In another setting, this Court in *Jerome v. United States,* 318 U. S. 101, 63 S. Ct. 483, 485, 87 L. Ed. 640, 643 (1943), discussed the problem at some length at page 104:

> "At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas v. Willcuts,* 296 U.S. 1; *Helvering v. Stuart,* 317 U.S. 154, and cases cited. But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer,* 312 U.S. 399, 402) and at time on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492, 503."

The decision of the court below presents a serious impairment to the federal program, not only in antitrust, but in all fields where "characterization" of the nature of the action may become an issue. This runs the gamut from antitrust, to civil rights, to taxation. In any of these fields, the decision of the court below makes it possible for a federal court enforcing a right created by Congress to "characterize" the nature of the right one way in California, another way under the federal system, and so on variously through the remaining states. This is anomalous and directly contrary to the pronouncements of this Court above set forth.

## III.

## The Decision of the Court Below Is in Total Conflict With the Decisions of This Court That the Law of a State Is a Question of Law, Not Fact, and Is Not to Be Reviewed on Appeal Under the "Clearly Erroneous" Test.

In all actions tried upon the facts without a jury findings of facts shall not be set aside unless clearly erroneous.

Fed. Rules Civ. Proc. Rule 52(a), 28 U. S. C.

The Court below asks itself whether it is to seek an original solution of the problem presented or merely to determine whether the trial court's conclusion and opinion is clearly erroneous. (Appendix A, p. 4) (330 F. 2d at 290). It concludes that "the latter is the proper measuring stick, and under it, after some soul searching," affirms the District Court. (Appendix A, p. 4) (330 F. 2d at 290).

However, whether the District Court applied the proper standard to essentially undisputed facts is a question of law, not fact.

> *United States v. Parke, Davis & Co.*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, 4 L. Ed. 2d 505, 515 (1960).

In *Lamar v. Micou*, 114 U. S. 218, 5 S. Ct. 857, 859, 29 L. Ed. 94, 95, this court held at page 223:

> "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."

Moreover, the District Court itself did not purport to find, as a matter of fact, the law of the State of California. The trial judge made a holding, not a finding:

> "Treating the question as *res integra*, as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both §338(1) and §340(1), I must hold that the one-year period specified in Cal. C.C.P. § 340(1) is the California statute of limitations properly applicable to Federal treble-damage anti-trust causes accruing prior to the effective date of the Federal four-year statute. (15 U.S.C. § 15b.)" (App. C, p. 43) (208 F. Supp. at 294).

The decision of the court below is in total conflict with the long-established doctrine that courts of the United States take judicial notice of the law of any state of the Union, and that the law of a state is therefore not a question of fact, but one of law.

IV.

**The Decision of the Court Below Is in Conflict With the Opinion of This Court in United States v. Gerlach Livestock Co., 339 U. S. 725, at 753, 94 L. Ed. 1231, at 1250, 70 S. Ct. 955, at 970 (1950), That a Superior Court of the State of California Is Not a Local Court but a Part of a System of State Courts, Whose Decisions Are Binding Upon Federal Courts.**

The California analogy to the Sherman and Clayton Acts is the California Cartwright Act, providing treble-damages under the State's antitrust law.

California Bus. & Prof. Code §16750, as amended;

California Bus. & Prof. Code §16750(a) (1959).

The issue of the application of California C. C. P. Sec. 338(1) or California C. C. P. Sec. 340(1) to a Cartwright Act cause of action was decided by the Superior Court of the State of California in and for the County of Fresno in the case of "Charles S. Ehrhorn, dba Navy Gas Co., plaintiff, vs. Camino! Company, a California Corporation, et al.," No. 97179 in the records of said Court. That decision was reprinted in full as an appendix to appellants' opening brief in the court below and is printed as Appendix D to this brief. It holds that the three year statute of limitations applies. Petitioners argued in the court below that the holding was binding on the federal courts, as California law, under the opinion of this Court in *United States v. Gerlach Livestock Co.*, 339 U. S. 725, 753, 84 L. Ed. 1231, 1250, 70 S. Ct. 955, 970 (1950).

Footnote 23 to *Gerlach, supra,* states:

> "23. Sacramento & San Joaquin Drainage District Co. vs. Superior Court in and for Colusa County, 196 Cal. 414, 432, 238 P. 687, 694. This is not a local court but a part of a system of State courts. It seems to fall within the rule of Fidelity Union Trust Co. vs. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L.Ed. 109, as a court whose decrees are regarded as determination of state law rather than within the rule of King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L.Ed. 608."

Though the *Gerlach* case, *supra,* was cited by petitiners in their opening brief in the Court below, was sought to be distinguished by respondents in their brief, and was re-cited and quoted by petitioners in their reply brief in the Court below, it receives no mention in the opinion of the Circuit Court. Instead, that Court quotes from its own opinion in *State of California v. Fred S. Renauld & Co.,* 179 F. 2d 605 (9th Cir. 1950), to the effect that federal courts are bound, by state court decisions at the trial level, only when a goodly number of the trial courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point.

*State of California v. Fred S. Renauld & Co. supra,* was decided January 12, 1950. *Gerlach, supra,* was decided June 5, 1950. The opinions are in conflict and the later opinion is that of this court in *Gerlach, supra,* presumably written with knowledge of the Ninth Circuit opinion in *State of California v. Fred S. Renauld & Co., supra.* Yet no mention is made of *Gerlach, supra,* in the opinion of the Court below and that

opinion restates with approval the principles laid down in *State of California v. Fred S. Renauld & Co., supra.* Certainly the members of the bar of the State of California are entitled to know whether trial court decisions of that state are to be treated in federal courts in accordance with *Gerlach, supra,* or as stated by the Ninth Circuit in *State of California v. Fred S. Renauld & Co., supra.*

V.

**The Decision of the Court Below Is in Conflict With King v. Order of United Commercial Travelers of America, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), in Refusing to Follow the Decisions of Intermediate Appellate Courts of the State of California Holding Federal Law Authoritative Under the California Anti-Trust Laws.**

The opinion of the court below states that federal courts, in determining what state law is or is to be, must follow an opinion of the Supreme Court of that state, or an opinion of an intermediate appellate court, citing *King v. Order of United Commercial Travelers of America, supra.* But it is well settled in California that federal decisions under the Sherman Act are authoritative in cases under the California Cartwright Act.

*Shasta Douglas Oil Co. v. Work,* 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190 (1963);

*Milton v. Hudson Sales Corp.,* 152 Cal. App. 2d 418, 440, 313 P. 2d 936 (1957);

*Rolley, Inc. v. Merle Norman Cosmetics, Inc.,* 129 Cal. App. 2d 844, 849, 278 P. 2d 63 (1954).

Under *King v. Order of United Commercial Travelers of America, supra,* the court below was bound to follow the above-cited California decisions and refer to the federal decisions as authoritative. This the Court did not do, because under federal law private actions for treble damages under the antitrust laws are not regarded as penal in nature, but as compensation.

> *Englander Motors, Inc. v. Ford Motor Co.,* 293 F. 2d 802, 806 (6th Cir. 1961).

The Court below distinguished *Milton v. Hudson Sales Corp., supra,* and *Rolley Inc. v. Merle Norman Cosmetics, Inc., supra,* on the ground that neither case passed upon nor approached the statute of limitations question, nor decided whether treble damage provisions are penal or remedial. In other words, the court below regarded itself as bound by *King v. Order of United Commercial Travelers of America, supra,* only if the state court decision was "on all fours". It did not follow state court decisions referring to the federal cases under the Sherman Act as authoritative. If the court below had followed such decisions, it would have had to characterize the private action for treble damages as remedial, in accordance with the federal weight of authority.

> *Englander Motors Inc. v. Ford Motor Company, supra,* at 805.

## VI.

## The Decisions of the Court Below in This Case and in Steiner v. 20th Century Fox Film Corp., 232 F. 2d 190 (9th Cir. 1956), Are in Conflict With Decisions of the Seventh and Tenth Circuits Construing the Tolling Provisions of the Second Paragraph of Section 5 of the Clayton Act.

### A. The Plain Meaning of the Statute.

Section 5 of the Clayton Act provides that, when the government proceeds, "the running of the statute * * * in respect of * * * every private (anti-trust) right of action * * * based in whole or in part on any matter complained of in (the government) * * * proceeding shall be suspended during the pendency thereof."

> 15 U. S. C. §16, as amended, 15 U. S. C. §16(b) (1955).

The plain meaning of this statute is clear enough. If petitioners' private right of action was even partly based upon any matter complained of in *United States v. Standard Oil Company of California, et al.*, Civil No. 11584-C, then the statute of limitations was tolled during the pendency of the Government case.

A "plain meaning" interpretation of the antitrust statutes was endorsed by this Court in *Radovich v. National Football League*, 352 U. S. 445, 454, 77 S. Ct. 390, 395 (1957) as follows:

> ". . . Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. Emich Motors Corp. v. General Motors Corp.,

> 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

A "plain meaning" interpretation of the tolling provisions of the statute serves an important public policy. As the Court said in *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446, 454 (D. Utah 1950):

> "Tolling the statute of limitations protects the plaintiff while his right of action ripens, and rewards him for witholding his suit at a time when it is the policy of the law to free the defendant from its annoyance."

If the tolling provisions of 15 U. S. C. §16 are narrowly construed, the well-advised plaintiff will sue promptly as soon as the filing of the Government suit makes it appear that he may have a cause of action. He will not risk the possibility that the statute of limitations is running against his claim during the pendency of the Government suit. As a consequence, the defendant in the Government suit will likely find that he is a defendant in many private suits brought by plaintiffs anxious to protect their rights of action. This cannot be the result which Congress intended.

**B. The Steiner Case Was Wrongly Decided.**

*Steiner v. 20th Century Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956), involved a suit brought by the lessor of a movie theatre against individual lessees and various theatre corporations for monopolizing the exhibition of motion pictures by, among other things, the leasing of theatres for less than a fair rental. Plaintiff

lessor claimed that she had been coerced into accepting a low rental by threats that otherwise her theatre would not get first-run pictures and that a competing theatre would be built to show first-run pictures.

The "pivotal issue" was whether plaintiff's claim was barred by the statute of limitations, or whether the running of that statute had been tolled under 15 U. S. C. §16 during the pendency of *United States v. Paramount Pictures,* Equity No. 87-273 (D.C.S.D.N.Y.).

The court held that plaintiff had not alleged a case sufficiently similar to the *Paramount* case to toll the statute of limitations. The court said: "A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d at 196.

To the extent that *Steiner* appears to require a private plaintiff who would toll the statute of limitations to plead the same overt acts as the Government has pleaded, it cannot be correct. The Government doesn't have to plead any overt acts whatever. The cases are collected in footnote 59 to *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 224, 60 S. Ct. 811, 845 (1940).

In evolving its stringent *Steiner* test, the court relied in part on *Christensen v. Paramount Pictures, Inc.,* 95 F. Supp. 446 (D. Utah 1950). This reliance was misplaced. In *Christensen,* the District Judge held that the Utah statute of limitations was tolled by 15 U. S. C. §16, as to defendants named in the *Paramount* complaint. The portion of the *Christensen* case apparently referred to in *Steiner* appears at 95 F. Supp. at 455.

It reads: "When Congress used the words 'any matter complained of' it referred to acts of the *named* defendants of which the Government might complain in any suit or proceeding." (Emphasis supplied.) The distinction under consideration was the difference between "named" defendants and "unnamed defendants." It had nothing to do with a distinction between the defendants' conspiracy and the overt "acts" which they may have committed in furtherance of that conspiracy.

*Momand v. Universal Film Exchange,* 43 F. Supp. 996 (D. Mass. 1942), particularly pages 1011-1013, was also relied upon by the court in *Steiner.* A close reading of those pages will reveal that with respect to a number of the plaintiff's causes of action, the statute of limitations was deemed to have been tolled. To be sure, the court in *Momand* did exclude other causes of action from the tolling provisions of 15 U. S. C. §16. The decision cannot, however, be taken as an authoritative statement of the law in view of the trial court's statement:

> "Since judgments there could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act." 43 F. Supp. at 1012.

This statement is incorrect. The test of the first part of the statute, which deals with prima facie evidence, is narrower than the second part, which deals with the tolling of statutes of limitation. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F. 2d 561, 569 (10th Cir. 1962). This is most obviously demonstrated

in the situation in which the Government loses. Clearly no *prima facie* case can be made by plaintiff based on the Government's loss. But it is nowhere suggested that the statute of limitations could not be tolled during the pendency of an unsuccessful Government suit. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F. 2d 561, 571 (10th Cir. 1962).

Similarly, when the government accepts a consent decree before any testimony has been taken, that decree may not be used by a private plaintiff as evidence against those who were defendants in the Government suit. 15 U. S. C. §16. But the statute of limitations on private actions based upon matters of which the Government has complained is surely tolled. *Radio Corp. of America v. Rauland Corp.,* 186 F. Supp. 704, 709-10 (N.D. Ill. 1956).

In addition to the above two District Court cases, which do not upon analysis offer any foundation for *Steiner,* the court relied upon the legislative history of the statute. The Ninth Circuit said:

> "In writing this provision ('any matter complained of') Congress made reference to the matters complained of in the public conspiracy action, not the conspiracy itself." See 232 F. 2d at 196.

If the statement refers to the preceding quotation from H. R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, then it is without support in the whole passage from which the quotation is taken. If it refers to some other expression of Congressional intent, then it is not supported by a citation.

The quotation from the House Report is part of a discussion which reads, in whole, as follows:

> "Section 6 provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.
>
> "It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."

The "wrongful acts of the defendant" mentioned in this passage are the acts which cause the plaintiff's injury. Such acts must of course be pleaded and proven by a private plaintiff before he can recover damages. But the passage does not suggest that any particular acts (other than a "conspiracy itself," in the language of *Steiner*) must be pleaded or proven in the Government case. On this latter point, the passage

is simply silent. And the case law is settled: the Government makes its case by pleading and proving the conspiracy alone, without showing any overt acts whatever. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 224, 60 S. Ct. 811, 845 (1940), footnote 59, and cases cited.

Finally, the Ninth Circuit itself in *20th Century Fox Film Corp. v. Goldwyn*, 328 F. 2d 190, 219-220, fn. 58 (9th Cir. 1964), has recently intimated that it may agree that the *Steiner* case was wrongly decided:

> "58. It is therefore unnecessary for us to decide whether this is likewise true with regard to conspiracies to exclude independently produced films from affiliated theatres, as charged in other sections of the *Paramount* complaint. Nor, in view of the disposition which we have made of this matter, do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required."

**C. The Steiner Case Is in Conflict With Decisions of the Seventh and Tenth Circuits.**

The month after the Ninth Circuit decided *Steiner v. 20th Century Fox Film Corp., supra,* the Seventh Circuit decided the case of *Grengs v. 20th Century Fox Film Corp.*, 232 F. 2d 325 (7th Cir. 1956), cert. denied 352 U. S. 871, 77 S. Ct. 96. The *Grengs* case was a treble damage action brought by a former motion picture exhibitor who alleged that he had been run out of business by a conspiracy which embraced both some *Paramount* case defendants and some local exhibitors

who had not been parties to the *Paramount* case. The trial court dismissed as to all defendants. On review, the Seventh Circuit analyzed a number of the statute of limitations problems and concluded that plaintiff's causes of action were barred as to certain defendants but not as to others. In comparing the plaintiff's complaint with the Government complaint in the *Paramount* case, the court said:

> "(Plaintiff's) amended complaint sets forth a right of action arising under the antitrust laws of the United States and, in so doing, *duplicates violations* of said laws charged against the same distributor defendants in the Paramount case. Thus plaintiff sets forth a private right of action which is, at least in part, grounded on the same matters of which the Government complained in the Paramount case." 232 F. 2d at 330. (Emphasis added.)

Just what were those "violations" which Grengs' complaint "duplicated"? The only such "violations" which were pending in the *Paramount* case for long enough to help Grengs were the defendant's "vertical integrations". (See 232 F. 2d at 333 where the court said:

> "Thus it was . . . determined that the vertical integrations were active aids to the conspiracy . . . (and were) therefore violations of the act. The amended complaint herein charges such vertical integrations . . . Hence this action was not barred by the statute of limitations . . .")

Thus it can be seen that the *Grengs* case is clearly inconsistent with the *Steiner* case. *Steiner* insists that "the same means must be used to achieve the same objectives of the same conspiracies by the same defend-

ants." (232 F. 2d at 196.) The *Grengs* case represents the better rule.

The Tenth Circuit has also recently addressed itself to the problem. In the case of *Union Carbide and Carbon Corp. v. Nisley*, 300 F. 2d 561 (10th Cir. 1962), that court considered the *Steiner* case, but refused to follow it. The *Nisley* court rejected the idea that "the tolling provisions of the second paragraph of Section 5 are confined to or governed by the evidentiary rules of estoppel, necessarily prevalent in the first paragraph." 300 F. 2d at 570. As the court explained, "The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." 300 F. 2d at 569.

It further rejected the idea that a private plaintiff should "be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result." 300 F. 2d at 570.

The Tenth Circuit held in the *Nisley* case that "there was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570. This is a broad test, and wholly incompatible with the test propounded by *Steiner*.

The *Steiner* case has been no better received in the District Courts than in the Circuits. In the case of *United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580 (D. Conn. 1959), the Court acknowledged the *Steiner* case, but held:

> "The substance of (the Government's) Louisiana action was that United Fruit was a nation-wide monopoly with power, for one thing, to set prices. The substance of the first count of the present declaration is that United Fruit had monopoly power in the Connecticut market area, by virtue of which it set arbitrary prices and injured the plaintiffs. It is not necessary that the Government set out these very acts in its complaint; substantial, not absolute, identity of matters is all that is required." 172 F. Supp. at 590.

*Radio Corp. of America v. Rauland Corp.*, 186 F. Supp. 704 (N.D. Ill. 1956), holds that the important thing is the conspiracy alleged by the Government, and not the particular kinds of harm alleged to result therefrom. There, counter-claimants alleged injury in their sale of radio apparatus. They sought a ruling that the statute of limitations as to appropriate counter-defendants was tolled by each of two Government suits. The court so held. As to the first, the court said:

> "It is true that the cause of action set forth in the counterclaim is based on damage and injury occurring from acts alleged to have hindered and hampered business in the sale of *radio receiving apparatus*, while the Government's complaint was designed to restore competitive conditions in the field of *telephony* . . . Nevertheless, the basic con-

spiracy complained of in the counterclaims and as set forth in Pars. 91 through 95 of the Government complaint in the telephone case appears to be the same." (186 F. Supp. at 709; emphasis added).

As to the second, the court said:

"While the Government was primarily concerned with the *incandescent lamp business* in the complaint referred to, it is also quite clear that the government considered this as part and parcel of a division of fields and territories between the lamp, radio, and telephone groups and that an effort was specifically made to terminate the arrangements created in the GE-AEI agreement of 1939 as they applied to all apparatus, *including radio.*" (186 F. Supp. at 712; emphasis added.)

In *Philco Corp. v. Radio Corp. of America,* 186 F. Supp. 155 (E.D. Pa. 1960), the court took a somewhat different tack. It construed plaintiff's complaint to include allegations of a smaller conspiracy within a larger conspiracy. The court then said:

"We, therefore, view the (plaintiff's) complaint as stating a separate and distinct cause of action against A.T.&T. and Western Electric for restraining trade in and monopolizing the public communications industry by means which included cross-patent licensing agreements with R.C.A., G.E. and Westinghouse, and an agreement between A.T.&.T. and Western Electric whereby the latter would supply all of the telephone equipment needed by A.T.&.T. . . .

"Recognizing the above allegations as stating a separate claim for relief against A.T.&.T. and

> Western Electric, there can be little doubt that the Government suit in question did in fact toll the statute as to such a separate claim. It is virtually identical with the matter complained of in the Government suit." (186 F. Supp. at 160.)

The allegations of plaintiff's complaint in the *Philco* case may have been "virtually identical" with the allegations of the Government complaint, but it is clear that they were allegations of violations of the antitrust laws, and not of specific acts by which those violations injured the plaintiff.

In conclusion it may be said that the *Steiner* case has received no more support in subsequent cases than it found in the law as it stood when *Steiner* was decided. It is in conflict with decisions of the Seventh and Tenth Circuits. The opinion of the Court below once again applies the *Steiner* tests. As such, the opinion of the Court below continues the conflict in the Circuits and perpetuates the erroneous *Steiner* doctrine.

Dated: Los Angeles, California, July 30, 1964.

Respectfully submitted,

RICHARD G. HARRIS,
*Attorney for Petitioners.*

*Of Counsel:*
MAXWELL KEITH.

## APPENDIX A.

### Opinion of United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Appellants, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Appellees. No. 18,333.

[April 2, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Burke, District Judge.

Barnes, Circuit Judge:

This is an appeal from a judgment of dismissal below, upon the sole ground the statute of limitations had run against The Progress Company on its cause of action against appellees, filed September 28, 1956. The action was for treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from the alleged violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Jurisdiction below rested on Sections 1337 of Title 28, United States Code, and rests here on Sections 1291 and 1294(1) of Title 28, United States Code.

It is conceded by appellant that its cause of action accrued no later than February 1954, and that the applicable statute of limitations began to run at that time. The question before us is *first:* What is the applicable statute of limitations? And, *second:* Whether (if the one year statute Cal. Code Civ. P. § 340(1) is applicable, rather than the three year statute Cal. Code Civ. P. § 338(1)) was tolled or suspended under § 5 of the Clayton Act (15 U.S.C. § 16, as amended, 15 U.S.C. § 16(b), 1955) by a similar proceeding "instituted by the United States."

The alleged similar proceeding was *United States v. Standard Oil Co., et al.,* Civil No. 11584-C, heretofore pending in the United States District Court for the Southern District of California (the same district from which this case arose, although the cases were assigned to and tried by different judges).

Seven specifications of error raise the above primary questions. They need not here be quoted in full. The appellees likewise raise two separate defenses,[1] which need not here be considered in view of our subsequent primary conclusions.

It is further conceded by both parties that the four year federal limitations period with respect to private causes of action under the antitrust laws is inapplicable to a cause accruing in 1954; and that resort must

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[1]II This Action Cannot Be Maintained Because It Was Not In Fact Filed by the Purported Plaintiff, The Progress Company.

"III The Undisputed Facts Show That The Progress Company Did Not Suffer Any Actionable Damage By Any Act of Appellees."

be had to state law. (*Steiner v. 20th Century-Fox Film Corp.*, 9 Cir. 1956, 232 F.2d 190, 194.[2]

The difficulty with the "solution" of "looking to state laws" is that there the problem starts.[3]

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[2]Amici Curiae lodged with the Clerk of this Court after the oral argument herein a motion for leave to file a brief. That motion was denied, but the amici parties cited with the motion are here mentioned. Amici differ with the agreed position taken by both parties to this appeal, that resort must be had to state law for the "characterization" of the cause of action created by 15 U.S.C. § 15. Cited are *Smith v. Cremins*, 9 Cir. 1962, 308 F.2d 187, and *Simler v. Connor*, 1963, 372 U.S. 221.

The first case involves civil rights (42 U.S.C. § 1983) and the action is upon a liability created by statute, "different from any which would exist at common law in the absence of statute" (p. 190). But no "penalty or forfeiture" exclusion is involved in *Smith v. Cremins*, or discussed therein.

*Simler v. Connor, supra*, involves in a diversity case, in a suit for attorneys' fees, the question whether state or federal law controls as to whether the plaintiff was entitled to a jury trial.

We see no controlling force in either of these opinions with respect to the issues presented in this case.

[3](a) "Since the antitrust laws specify no statute of limitations for private damage actions, courts look to state law. This approach, however, has produced more questions than answers." (The Report of The Attorney General's Committee to Study the Antitrust Laws, p. 381 (1955).)

(b) "In the federal statute of limitations, the allied tolling provisions, and other important provisions in the statutory scheme, there are critical terms and phrases which require more precise definition than Congress has seen fit to provide. The courts have attempted to provide the needed definitions, but these judicial elabora-

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This action is one where much can be said on both sides. Where a strong diversity of judicial opinion exists, and we attempt to prognosticate (as all other federal courts must who face the problem) the result at which a state court would arrive, we find many gray areas. Are we to consider what our opinion might be, based on an original solution of the problem, or are we to consider the trial court's conclusion and opinion, and determine only whether it is clearly erroneous? We conclude the latter is the proper measuring stick, and under it, after some soul searching, we affirm the district court. We are reminded of what Judge Wyzanski said so frankly to a jury in a private treble damage antitrust action (*Cape Cod Food Products v. National Cranberry Association,* D.Mass. 1954, 119 F.Supp. 900, 910) speaking of damages, "You can't go to a book and look for the answer."

The California Code of Civil Procedure §§ 335 and 338(1) read as follows (in pertinent part):

> "§ 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows * * *
>
> § 338. * * *
>
> Within three years:
>
> 1. An action upon a liability created by statute, other than a penalty or forfeiture."

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tions are as often confusing and contradictory as they are helpful." (Wiprud, G.W., "Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles." 57 Northwestern Univ. L. Rev. 29 (1962).)

California Code of Civil Procedure § 340(1) reads as follows (in pertinent part):

> "§ 340. * * *
>
> Within one year:
>
> 1. Statutory penalty or forfeiture. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation; * * *"

Is the action based upon a statutory penalty or forfeiture, or is it an action based upon a liability created by statute other than a penalty or forfeiture?[4]

In considering this question, it is our problem, as it was that of the court below, to determine not what we would rule were it a case of first impression before us, but which of said statutes a California court would apply if it had jurisdiction of this case. *Hall v. Copco Pacific, Ltd.*, 9 Cir. 1955, 224 F.2d 884.

Appellants have five prongs to their spear in their attack on the one year penal statute interpretation. We discuss each of appellants' contentions in turn.

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[4]This court has stated in so many words, "An action to recover damages resulting from a violation of the Sherman Anti-trust Act is not an action to recover a penalty." *Hicks v. Bekins Moving and Storage Co.*, 9 Cir. 1937, 87 F.2d 583, relying solely on *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 1906, 203 U.S. 390, 397. *Chattanooga* is mentioned later, in the quotation of Judge Mathes' opinion below. The only two cases cited in *Chattanooga* to support the court's conclusion are: *Huntington v. Attrill*, 1892, 156 U.S. 657, 658, and *Brady v. Daly*, 1899, 175 U.S. 148, 155, 156. These are also cited in Judge Mathes' memorandum decision. And see note 7, *infra*.

(A) Appellants suggest that "at least one California trial court has construed the action as compensatory rather than penal." This decision is unreported, but what purports to be a certified copy of a "Memorandum and Order on Demurrers and Motions to Strike" is attached to appellants' opening brief as an appendix. It is from the Superior Court of the State of California in and for the County of Fresno, No. 97179, and is entitled "Charles S. Ehrhorn, d.b.a. Navy Gas Co., Plaintiff, vs. Caminol Company, et al, Defendants."

The trial judge in *Ehrhorn v. Caminol Co., supra,* first sustains certain general and special demurrers, and grants leave to amend. He likewise states: "The Court is of the opinion that the three year statute of limitations applies." This is a state action based on the Cartwright Act, a state antitrust statute. No reasons are given for the holding; and no authority is cited. We do not know what the precise issue was, raised by the pleadings then before the trial judge, or whether he was merely delivering "an advisory opinion" to aid counsel for plaintiffs therein in drafting his required new complaint. We think it of some, but little precedential value.

We adopt in this connection a portion of appellees' argument, appearing in their opening brief:

> "[A] decision of the Superior Court at an intermediate stage of the case is binding on one, *Stevens v. Key-Resistor Corp.* (1960) 186 C.A. 2d 325, 8 Cal. Rptr. 908; *Carley v. City of Santa Rosa* (1957) 154 C.A. 2d 214, 315 P.2d 905; *Curnutt v. Holk* (1962) 203 A.C.A. 6 [203 C.A. 2d 6, 21 Cal. Rptr. 224]; *Phillips v. Phillips* (1953) 41 Cal. 2d 869, 874, 264 P.2d 926; *Grable*

*v. Citizens Nat. Trust & Sav. Bank* (1958) 164 C.A. 2d 710, 331 P.2d 103, and even a final decision is not binding on any other superior court. *People v. Cowles* (1956) 142 C.A. 2d 865 298 P. 2d 732; see generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456, 369 P.2d 937. Superior Court opinions are rarely reported in California and there is no digest of points decided in such opinions. It is precisely for this reason that *King v. Order of Travelers* (1948) 333 U.S. 153, 161-162, held that state trial court decisions need not be regarded by federal courts in diversity actions as declaratory of state law. Otherwise a plaintiff might secure a fortuitous victory in a federal court by virtue of an authority that would not be recognized in the state courts and might be contrary to many other such unreported cases.

Upon the basis of its own through knowledge of the nature of California Superior Courts, this Court in *State of California v. Fred S. Renauld & Co.*, 179 F.2d 605 (9 Cir. 1950) with careful analysis rejected an argument that a decision of a Superior Court is binding on the United States Court of Appeals, saying (179 F.2d at 609).

> 'federal courts are bound (a) when the supreme judicial tribunal of the state has decided a given question, or (b) a state appellate court which is in the line of the state appellate structure leading up to the supreme tribunal of the state has decided, it, or (c) a *goodly number of the trial courts of the state generally and for a considerable period of time have adhered to a common*

*interpretation of the point.* Niether of the cited California decisions is binding on any other court of the state excepting only that the Superior Court Appellate Department decisions may be said to be binding on other Municipal Courts of the county in which the decision was had.

'It is our opinion that neither of the California cases cited falls within either of the categories mentioned and neither, nor both of them together, bind the federal court.'" (Emphasis appellees'.)

In *Reid v. Doubleday & Co.,* N.D. Ohio 1952, 109 F.Supp. 354, Judge Kloeb, a trial judge experienced in antitrust litigation, held that treble damages awarded under the Robinson-Patman Act were remedial rather than penal, and in doing so, considered whether a federal court, in determining what state law is or is to be, and eliminating "other persuasive evidence," must follow (a) the Supreme Court of that state; (b) an intermediate appellate court; (c) lower state courts of original jurisdiction. He stated the answers are to (a) "Yes." *Erie Railroad Co. v. Tompkins,* 1938, 304 U.S. 64; to (b) "Yes." *King v. Order of United Commercial Travelers of America,* 1948, 333 U.S. 153; *Six Companies v. Highway District,* 1940, 311 U.S. 180, *reh. den.* 311 U.S. 730; *Fidelity Union Trust Co. v. Field,* 1940, 311 U.S. 169, *reh. den.* 311 U.S. 730; to (c) "Yes and no." *King v. Order of United Commercial Travelers of America, supra,* at 159. The federal courts, he concludes, may or may not follow the lower state courts, as they think proper.

In deciding the matter, Judge Kloeb relied on many of the cases later cited and discussed herein (p. 363).

(B) Turning to the cases which appellants list as recognizing the three year statute, we find the following listed: *Burnham Chemical Co. v. Borax Consolidated,* 9 Cir., 1948, 170 F.2d 569, 578, *cert. den.* 336 U.S. 924, *reh. den.* 336 U.S. 955; *Suckow Borax Mines Consol. v. Borax Consolidated,* 9 Cir. 1950, 185 F.2d 196, 207; *cert. den.* 340 U.S. 943, *reh. den.* 341 U.S. 912; *Steiner v. 20th Century-Fox Film Corp. supra.* (In the last two cases cited the authority is dimmed somewhat by the fact the parties agreed that the three year statute applied.) Four district court decisions are then listed—two each from Northern and Southern California: *Aero Sales Co. v. Columbia Steel Co.,* N.D. Cal. 1954, 119 F.Supp. 693; *Manny v. Warner Bros. Pictures,* S.D. Cal. 1953, 116 F.Supp. 807; *Levy v. Paramount Pictures,* N.D. Cal. 1952, 104 F.Supp. 787; *United West Coast Theatres Corp. v. South Side Theatres,* S.D. Cal. 1949, 86 F.Supp. 109.

In the *Burnham Chemical Co.* case, *supra,* a reading indicates that this court stated (at p. 578): "The [trial] court *therefore* properly held the cause barred by Section 338(1) of the California statute of limitations." (Emphasis added.) The "therefore" refers to the fact that "the only damages for which a recovery might be had (under federal antitrust laws) are those which accrued and were suffered within three years prior to the filing of the complaint and the record reveals that none were shown during this period." Obviously if no damages could be shown during a three year period immediately prior to the filing of the complaint, none could be shown during the one year period prior to the filing of the complaint; hence no choice between the two periods was offered the court, nor

any choice between the two periods necessary or required.

Thus a reading of *Burnham, supra, Suckow Borax Mines, supra,* and *Steiner v. Twentieth Century Fox, supra,* indicates that in none of these has the precise issue here present been met. In the first it was not necessary because of the facts; in the last two, the three year statute was agreed upon by the parties as applicable.[5]

In *Aero Sales Co. v. Columbia Steel Co.,* N.D. Cal. 1954, 119 F.Supp. 693, Judge Harris held that Judge Goodman, in *Wolfe v. National Lead Co.,*[6] had already decided the question that the treble damage provision of the Clayton Act was not penal, hence the three year statute prevailed, and that Judge Harris concurred despite "persuasive arguments" in favor of the one year penalty theory. Judge Harris also referred to the *United West Coast Theatres (supra)* opinion which was written by Judge Mathes (the same judge who came to the opposite conclusion in our instant case). Judge Harris discussed and differentiated *Ben C. Jones & Co. v. West Publishing Co.,* 5 Cir. 1921, 270 Fed. 563, dismissed, 270 U.S. 665, upon two grounds—(1) it had not been followed, either in the courts of Texas nor in the federal courts sitting in that state, and (2) that in the *Jones* case, the four year statute was an effective bar, without a consideration or discussion as to whether the two year Texas

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[5]185 F.2d at 207 and 232 F.2d at 194, respectively.

[6]No. 29500, unreported, in the District Court for the Northern District of California.

statute prevailed, as the action was barred by either statute of limitations.

In *Manny v. Warner Bros., supra,* Judge Westover specifically noted:

> "[I]t is immaterial whether the plea of the statute of limitations is under the provisions of subdivision 1 of § 340 or subdivision 1 of § 338 of the Code of Civil Procedure of the State of California. If the contention of moving defendants is correct . . . then the cause of action is barred by both sections." (116 F.Supp. at 808-809.)

In *Levy v. Paramount Pictures, supra,* Judge Carter assumed the three year statute applied, without the necessity of determining whether the one year statute was applicable.

In *United West Coast Theatres Corp. v. South Side Theatres, supra,* Judge Mathes, after reciting that the California courts had not decided the point (86 F.Supp. at 110), ruled:

> ". . . the nature of the remedies accorded a private person . . . would seem to mark the liability as one 'created by statute, other than a penalty or forfeiture' . . ." (the language used in § 338(1).)

Judge Mathes then cites *Fleitmann v. Welsbach Street Lighting Co.,* 1916, 240 U.S. 27, 29; *United Copper Securities Co. v. Amalgamated Copper Co.,* 1917, 244 U.S. 261, and relies upon *Burnham Chemical, supra,* already discussed as a ninth circuit case supporting his position, and refers to *Foster & Kleiser v. Special Site Sign Co.,* 9 Cir. 1936, 85 F.2d 742, 751-

753, *cert. den.* 299 U.S. 613; *Culver v. Bell & Loffland*, 9 Cir. 1944, 146 F.2d 29, 31, and states:

> "[T]his action having been commenced more than six years . . . after . . . [each claim for damages had accrued] the counterlcaim is long barred by § 338(1) of the California Code of Civil Procedure, unless . . . tolled."

In reversing his position in his re-examination of the problem in this case, Judge Mathes gave it careful study. He states in his memorandum of decision filed August 30, 1962 (to be considered as his Findings and Conclusions, Tr. p. 1226):

> "The correct method whereby to determine which State statute of limitations is properly applicable to a cause arising under the antitrust laws prior to the Federal limitations statute has been the subject of some judicial disagreement. One view is that, inasmuch as the private antitrust action involves a Federal cause of action, whatever State limitations period is to be applied turns upon the Federal court's view as to the nature of the Federal action, as being either 'remedial' or 'penal'. *Cf.: Fulton v. Loew's Inc.*, 114 F. Supp. 676, 682 (D. Kan. 1953); *Christensen v. Paramount Pictures*, 95 F.Supp. 446, 449 (D. Utah 1950); see also *Momand v. Universal Film Exchange*, 43 F. Supp. 996, 1008-1009 (D. Mass. 1942).] And since the Court concluded in the *Chattanooga Foundry* case, *supra*, 203 U.S. 390,[7] that action

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[7]Concerning *Chattanooga, supra,* the second circuit distinguished it in these words:

> "Considered in the light of these principles, the Supreme Court's decision in Chattanooga Foundry

for treble damages under the Federal antitrust laws are not subject to the general Federal statute of limitations governing actions to recover a 'penalty' under the laws of the United States [28 U.S.C. § 791, as amended, *id.* § 2462 (1948)], it has been reasoned that a State limitations statute dealing with recovery of 'penalties' in the State courts cannot in any event be applied to treble-damage claims grounded upon Federal antitrust violations. [See: *Greene v. Lam Amusement Co.*, 145 F.Supp. 346, 348 (N.D. Ga. 1956); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F.Supp. 506, 509 (D. Colo. 1952).]

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& Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S.Ct. 65, 66, 51 L.Ed. 241, is not decisive of this case. There the Supreme Court held that an action for treble damages under the anti-trust laws was not an action for a penalty within the meaning of the federal statute of limitations for penal suits [note]. But the word 'penalty' in a federal statute has a different meaning than the same word in the New York statute. The federal statute of limitations for penal actions applies only to actions on behalf of the United States and *qui tam* actions. Huntington v. Attrill, 146 U.S. 657, 668, 673, 13 S.Ct. 224, 36 L.Ed. 1123. The New York statute by its express terms applies to actions 'by the person aggrieved' and thus, unlike the federal statute, applies to private actions. Huntington v. Attrill, supra, 146 U.S. 677-678, 13 S.Ct. 231." (*Bertha Building Corp. v. National Theatres Corp.*, 269 F.2d 785 at 788-789.)

And *cf. Englander Motors, Inc. v. Ford Motor Co.*, 6 Cir. 1961, 293 F.2d 802; *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, N.D. Ala. 1960, 197 F. Supp. 333, *affirmed*, 5 Cir. 1961, 295 F.2d 362.

"The majority view, however, as formulated in recent years, holds that the question of limitations applicable to private antitrust actions was, as Mr. Justice Holmes put it, 'left to the local law by the silence of the Statutes of the United States'. [*Chattanooga Founday & Pipe Works v. Atlanta, supra,* 203 U.S. at 397.] Moreover, the word 'penalty', as applied in a Federal statute such as 28 U.S.C. § 2462, obviously may have 'a different meaning than the same word in the . . . [State] statute'. [*Bertha Building Corp. v. National Theatres Corp.,* 269 F.2d 785, 788 (2 Cir. 1959); *cert. denied,* 361 U.S. 960 (1960).] Accordingly, in keeping with the principle that statutory construction by a State's highest court is deemed an integral part of the text of the State's statute of limitations, it has been declared that Federal courts 'must accept the statutes as construed and interpreted by the . . . [State] courts. It is for them to determine what is meant by the word "penalty" in the . . . [State] statute'. [*Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785-788 (2d Cir. 1959), *cert. denied,* 361 U.S. 960 (1960); *cf.: Moore v. Illinois Central R. Co.,* 312 U.S. 630, 634 (1941); *Costello v. Bank of America,* 246 F.2d 807, 812 (9th Cir. 1957).]

"Adherence to the rationale just stated has required the Federal courts to compare the nature of the Federal treble-damage antitrust action with that of analogous State causes, as construed by the courts of the particular State involved, and from such a comparison to decide which local statute of

limitations the courts of the State would deem applicable to actions embracing Federal treble-damage antitrust claims. [See: *North Carolina Theatres, Inc. v. Thompson,* 277 F.2d 673 (4th Cir. 1960); *Powell v. St. Louis Dairy Co.,* 276 F.2d 464 (8th Cir. 1960); *Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785; *Gordon v. Loew's Inc.,* 247 F.2d 451 (3rd Cir. 1957); *Green v. Wilkinson,* 234 F.2d 120 (5th Cir. 1956); *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* 191 F.2d 912 (7th Cir. 1951); *cert denied,* 342 U.S. 947 (1952); *Leonia Amusement Corp. v. Loew's Inc.,* 117 F.Supp. 747 (S.D. N.Y. 1953); *and see: Cope v. Anderson,* 331 U.S. 461 (1947); *Englander Motors, Inc. v. Ford Motor Co.,* 293 F.2d 802, 806 (6th Cir. 1961); *Momand v. Universal Film Exchanges,* 172 F.2d 37, 47 (1st Cir. 1948); *cert. denied,* 336 U.S. 967 (1949); *United Banana Co. v. United Fruit Co.,* 172 F.Supp. 580, 585 (D. Conn. 1959); *compare: Brady v. Daly,* 175 U.S. 148 (1899); *Huntington v. Attrill,* 146 U.S. 657 (1892).]

"A study of the decisions convinces me that the precedent of seeking guidance from the construction given a particular limitations statute by State courts is a sound one to follow in the case at bar, notwithstanding the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions. [See : *North Carolina Theatres, Inc. v. Thompson, supra,* 277 F.2d 673; *Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785; *Englander Motors, Inc. v. Ford Motor Co.,*

186 F.Supp. 82, 90 (N.D. Ohio 1960), *modified on other grounds,* 293 F.2d 802 (6th Cir. 1961).]

"Turning, then, to the scope of the three-year [Cal. C.C.P. § 338(1)] and the one-year [Cal. C.C.P. § 340(1)] statutes in question here, as construed by the State courts, it is noted that although the California courts have not as yet interpreted for limitations purposes a similar private-action provision under the State's antitrust law [see Cal. Bus. & Prof. C. § 16750, as amended, *id.* § 16750 (a) (1959)], they have considered the applicability of both § 338(1) and § 340(1) on several occasions in cases involving circumstances closely analogous to those presented at bar. For example, a statutory provision for recovery of twice the amount paid to a decedent in excess of legally-incurred payments under the State Old Age Security Law has been characteciced as 'penal,' and hence the one-year period of limitation specified in § 340 (1) was held applicable. [*Department of Social Welfare v. Stauffer,* 56 C.A. 2d 699, 133 P.2d 692 (1943).]

"The same result was reached where 'liquidated damages' were imposed by statute for failure of gas and electric companies to supply requisite power [*Hansen v. Vallejo Electric Light & Power Co.,* 182 Cal. 492, 188 P. 999 (1920); *compare Los Angeles County v. Ballerino,* 99 Cal. 593, 32 P. 581 (1893)]; where court reporter fees were reduced for failure to comply with court rules [*County of San Diego v. Milotz,* 46 C. 2d 761, 300 P.2d 1 (1956)]; and where a buyer sued for return of the amount paid under a conditional sale contract upon

the seller's interference with payment of the balance of the debt prior to maturity [*Stone v. James,* 142 C.A. 2d 738, 299 P.2d 305 (1956)].

"The California courts have also characterized as 'penal' a statutory provision for double damages in trespass actions involving timber [*Helm v. Bollman,* 176 C.A. 2d 838, 1 Cal. Rptr. 723 (1959); *cf. Swall v. Anderson,* 60 C.A.2d 825, 141 P.2d 912 (1943)]; likewise a statutory provision for treble damages in actions for unlawful detainer [see: *Hoban v. Ryan,* 130 Cal. 96, 62 P. 296 (1900); *Gwinn v. Goldman,* 57 C.A.2d 393, 134 P.2d 915 (1943)], as well as for damages to adjacent property caused by fire [*Clark v. San Francisco & S. J. Val. Ry. Co.,* 142 Cal. 614, 76 P. 507 (1904); see also *Esposti v. Rivers Bros.,* 207 Cal. 570, 279 P. 423 (1929)].

"While there has been no such concurrence of views as to the proper characterization of Federal treble-damage anti-trust actions [see: *Schiffman Bros. v. Texas Co.,* 196 F.2d 695, 697 (7th Cir. 1952); *Leonia Amusement Corp. v. Loew's Inc., supra,* 117 F.Supp. at 756; *and see Loevinger, Private Action—The Strongest Pillar of Antitrust,* 3 Antitrust Bull. 167 (1958)], it is reasonable to characterize such actions as compensatory in part, and as exemplary or penal with respect to the trebling of damages to business or property resulting from antitrust violations [see *Lyons v. Westinghouse Electric Corp.,* 222 F.2d 184, 189 (2nd Cir.), *cert. denied,* 350 U.S. 825 (1955); *cf. Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 365 (9th Cir. 1955)].

"Moreover, the California Supreme Court has characterized as a penalty 'any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former.' [*Miller v. Municipal Court,* 22 C.2d 818, 837, 142 P.2d 297, 308 (1943); see also *Grossblatt v. Wright,* 108 C.A. 2d 475, 239 P. 2d 19 (1951)].

"The conclusion is thus impelled that § 340(1) of the California Code of Civil Procedure, as construed by the California courts, is applicable to treble-damage causes under the Federal antitrust laws which accrued prior to the effective date of the four-year Federal limitations period. [15 U.S.C. § 15b.] Inasmuch as plaintiffs' cause of action admittedly occurred in February 1, 1954, and this action was not commenced until September of 1956, application of the one-year period specified in §340(1) would clearly raise the time bar upon which defendants rely for summary judgment of dismissal. * * *"

The trial judge then turned to the ninth circuit cases hereinbefore mentioned, and the previous district court decisions from this circuit, *supra,* and concluded:

"Treating the question as *res integra,* as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both § 338(1) and § 340(1), I must hold that the one-year period specified in Cal. C.C.P. § 340 (1) is the California statute of limitations properly applicable to Federal treble-damage antitrust causes accruing prior to the effective date of the Federal four-year statute. [15 U.S.C. § 15b.]"

We have examined the cases cited in the trial court's memorandum, and we believe they, and his reasoning based thereon, carry conviction. *Cf: Isom v. Rex Crude Oil Co.,* 140 Cal. 678, 680, 74 Pac. 294 (1903) and *Penziner v. West American Finance Co.,* 10 Cal.2d 160, 170, 74 Pac. 252 (1937), and our brief discussion of the penalty theory lying behind treble recovery in antitrust litigation in *Flintkote Co. v. Lysfjord,* 1957, 246 F.2d 368, 398, *cert. denied,* 355 U.S. 835.

While appellees cite cases from six other state jurisdictions supporting their position, we do not feel that the manner in which other state courts interpret their particular statutes would foretell what the California courts might do, absent an almost unanimous rule in other states. Such unanimity of opinion in other states does not exist. We agree with appellants (Reply Brief, p. 6):

> "Everyone concedes that the problem is how a California court would characterize this action under the language of the two specific California statutes. If that is the problem, of what assistance is it to know how a New Jersey Court characterized a private antitrust action under different language in different statutes as interpretated (sic) by different decisions."

We realize that Judge Murphy in *McLean v. Paramount Pictures, Inc.,* No. 30262, ..... F.Supp. ..... (in proceedings had on January 10, 1958), held the three year statute applicable, stating:

> "[T]he Ninth Circuit has never squarely passed upon this issue. However, for almost ten years

now the Ninth Circuit has assumed that the three year period of Section 338(1) is the applicable statute."[8]

He cited the cases we have discussed above, his former opinion in *Samuel Goldwyn Prod. v. Fox West Coast Theatres Corp.*, N.D. Cal. 1956, 146 F.Supp. 905, and *Christensen v. Paramount Pictures*, D. Utah 1950, 95 F.Supp. 446, 449.

In *Goldwyn*, it was said:

> "The applicability of the three year statute of limitations of Cal. Code of Civil Procedure § 338(1) . . . to this proceeding is not in issue on this motion, and may be assumed for the purposes of this motion [involving its tolling] to be undisputed." (146 F.Supp. at 906.)

In *Christensen, supra*, Judge Ritter said:

> "On the other hand, counsel for plaintiff contend that the Utah statute of limitations for 'An action upon a statute for a penalty or forfeiture where the action is given to an individual * * *' does not apply to actions for treble damages under the Sherman and Clayton Anti-Trust Acts.
>
> It is my judgment that the Utah statute of limitations, when it speaks of an action upon a statute for 'a penalty or forfeiture where the action is given to an individual, or to an individual and the

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[8]This is copied from Reporter's Transcript of Pre-Trial Hearing in Chambers, held January 10, 1958, in "Daniel O. McLean, et al. v. Paramount Pictures, Inc., et al.," United States District Court (No. 30,262) for the Northern District of California, Southern Division, pp. 25-26.

> state,' refers to actions to enforce the criminal law, in the nature of the well-known informers actions. The language of this statute is not modern. It has been in the Anglo-American statutory law for a long time and I very seriously doubt that the legislative history of this provision would justify its application to suits for treble damages under the Sherman Anti-Trust and Clayton Acts." (95 F. Supp. at 449.)[9]

(C) Appellants also make limited reference to the 1914 Congressional Record; and the 1950 Congressional Record listing of the State of California as having a three year statute (96 Cong. Rec. 10439-41 (1950)).

We note that Senator Hoar, the author (or at least the person in charge of the bill in the Senate) referred to the three-fold damage provision as "establishing a *penalty . . . purely penal and punitive.*" (Emphasis added. 21 Cong. Rec. 3146-47 (1890).)

(D) Heavy emphasis is placed by appellants on a law review article authored by Professor Lawrence Vold, appearing in 28 Kan. L.Rev. 117, particularly 152-159 (1940), entitled: "Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?" Starting with II Samuel (Chapter 12, Verses 1-6), he represents that the criminal punishment (death) therein decreed was alone "penal," that the "lamb restored fourfold"

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[9]There then appears note 8 in the *Christensen* case, referring to *Huntington v. Attrill*, 146 U.S. 657 (vide post) and the reference therein to Lord Watson's statements (vis-a-vis those of Master of the Rolls Lindley in *Shelton Elec. Co. v. Victor Talking Machine Co.*, D.C. N.J. 1922, 277 Fed. 433, 435-436) giving the legislative history of the English statute of limitations.

was "reparation" to the injured party, and nothing more. We agree with Professor Vold when he states "the available terminology relating to damages and penalties is very slippery language." He buttresses his argument by suggesting that the "defendant" both in the Bible and in antitrust litigation is a "rich and powerful wrongdoer," while the plaintiff is "a very poor man, who has but his own little business to which he devotes his life" (p. 120), that there are "intangible elements to which no definite measure in pecuniary loss can readily be applied" (p. 124)—these he groups and describes as "accumulative harm" (p. 125). Professor Vold disagrees, for example, with Judge Runyon in his opinion in *Haskell v. Perkins,* D.C.N.J. 1928, 28 F.2d 222, *reversed on other grounds,* 31 F.2d 53, wherein that court stated (with considerable logic):

> "[B]ut if, on the other hand, the damages as awarded by the jury constitute in their entirety everything that is compensatory, then the trebling of the damages and the [additional] attorneys' fee would appear to lie entirely outside the scope of compensation. . . ."

"Consequently," says Professor Vold,

> "the reasoning [of Judge Runyon] utterly ignores the element of liquidating compensation for accumulative actual harm in the intangible elements involved when a going business is destroyed in violation of the anti-trust act. The opinion thus merely blindly assumes that the threefold damage provision is merely punitive." (p. 151)

Judge Runyon's conclusion appears to us to be correct, unless we assume that "unprovable" compensation in excess of full provable compensation can be some-

thing other than punitive damages. If it cannot be compensation, and cannot be punitive, then what is it? Because "accumulative harm" is difficult or impossible of proof, says the Professor, some or all of whatever damages are awarded beyond provable compensation must be classified as compensatory damages and not penal. We think one purpose of a "penalty" in the antitrust statutes is to award damages for losses that are either difficult of proof, or cannot be precisely ascertained (and hence are incapable of proof as compensatory damages), as well as to discourage the anticompetitive activities which gave rise to the antitrust cause of action. But no matter the reason, the amount awarded over and above compensation is to penalize—to do more than compensate.

This does not mean we need disagree with Professor Vold that "the threefold damage provision as used in the federal anti-trust act is not a provision for a penalty, *using that term in the strict sense of a payment exacted and collected by the state as a punishment by way of example to deter other evildoers.*" (P. 158; emphasis added.)[10] Punishment and deterring effect is certainly part of its purpose, but it may well have a second purpose; that of awarding damages beyond those compensable damages capable of proof.

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[10]"An analysis of the statutory provisions upon which the plaintiffs sue [15 U.S.C. § 15] clearly indicates that the actual loss sustained by plaintiffs is only a base upon which the sanction of treble damages is superimposed. Thus, the fundamentally penal character of the right of action is evident." *Banana Distributors v. United Fruit Co.*, S.D. N.Y. 1957, 158 F.Supp. 160 at 163.

The provisions of the statute giving the wronged individual the right to sue prevent the word "penalty" from being defined in such a strict sense as the law review article states. The statute is, as has been said, *"sui generis." Imperial Film Exch. v. General Film Co.,* S.D. N.Y. 1915, 244 Fed. 985, 987. Congress theorized that useful social purpose could be accomplished if private individuals or companies can and will aid their government in enforcing antitrust laws. To do this they require encouragement that the private litigant may recover *more* than his or its actual compensatory damages.[11] What is recovered under Section 7 of the Sherman Act (15 U.S.C. § 15) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. § 6.) The treble damage provision cannot be classified as exemplary damages, in the ordinary legal sense of that phrase, for in antitrust the jury has no authority or discretion to decline to award, or as to how much to award, once the compensatory amount of damages is determined. But we insist it has some attributes of a penal statute.

We conclude Professor Vold suggests an interesting legal theory, *i.e.,* that the courts should recognize that antitrust treble damages awards are made up of two sums, one compensatory for actual damage, and the second compensatory for accumulative intangible unprovable harm, requiring recognition that the total of the treble damages awarded was compensatory, and not pe-

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[11]See Note, 75 Harvard Law Review 627 (1962).

nal. But we think this emphasizes but one of the peculiar reasons underlying the adoption of our antitrust laws, and is not the sole reason underlying the provision for treble damages. Such special, select (and perhaps deserved) interpretation must, in our opinion, await legislative action, rather than be created by judicial enactment.

(E) Finally, appellants cite federal cases from other jurisdictions where the courts have allegedly "impliedly agreed" that the private antitrust action is compensatory or remedial, rather than penal in nature; citing: *Bertha Building Corp. v. National Theatres, Corp.*, 2 Cir. 1959, 269 F.2d 785, 789, *cert. denied* 361 U.S. 960; *Fulton v. Loews, Inc.*, D.Kan. 1953, 114 F.Supp. 676, 680; *Christensen v. Paramount Pictures*, D. Utah 1950, 95 F.Supp. 446.

In *Bertha Building Corp. v. National Theatres, Corp., supra*, the court of appeals, Judge Swan writing the opinion, considered the general rules hereinbefore enunciated, and pointed out that Judge Ryan, of the District Court for the Southern District of New York, had held the six year New York statute (§ 48, Subdivision 2, New York Civil Practice Act) applicable; not the three year (§ 49, Subdivision 3 of the New York Civil Practice Act); for the latter was not applicable "to private suits for damages which are exemplary in part but not wholly unrelated to actual loss." (269 F.2d at 789.) (This was a reference to the opinion in *Leonia Amusement Corp. v. Loews Inc., supra*, at 752.

Four years later in *Banana Distributors v. United Fruit Co.*, S.D. N.Y. 1957, 158 F.Supp. 160, Judge Levet concluded the shorter three year New York statute

should be applied to an action upon a statute for a penalty or forfeiture.[12]

Judge Swan held, in *Bertha Building, supra,* the New York rule to be that a treble damage action in that state is not an action on a penalty statute—agreeing with Judge Ryan largely based on the persuasive New York Court of Appeals decision by Judge Desmond in *Sicolo v. Prudential Savings Bank of Brooklyn,* N.Y. 1959, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E. 2d 284. In that case a fireman sued for damages sustained by him in fighting a fire in defendant's bank building after defendant violated a safety law. "That statute provides in substance that the injured fireman was entitled to recover his actual damages, but in no event less than $1,000, regardless of actual loss." (269 F.2d at 789.) The New York state court ruled the longer statute of limitations was applicable—because it was a liability created by statute, not a penalty or forfeiture.

In *Fulton v. Loews Inc., supra* at 680, the court did, as appellees correctly state, take the "federal" approach —*i.e.,* held that the federal rule as to whether the antitrust laws provided a remedial and compensatory recovery, or a penal recovery, should control over a doubtful state law.

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[12]Judge Levet cites and quotes from *Karseal Corp. v. Richfield Oil Corp.,* 9 Cir. 1955, 221 F.2d 358, 365. *Fanchon & Marco v. Paramount Pictures, Inc.,* S.D. Cal. 1951, 100 F.Supp. 84, 88, *affirmed* 215 F.2d 167, *cert. den.* 345 U.S. 964; *United States v. Standard Ultramarine & Color Co.,* SD. N.Y. 1955, 137 F.Supp. 167; *American Banana Co. v. United Fruit Co.,* S.D. N.Y. 1907, 153 Fed. 943, and many other cases.

Appellees urge and appellants concede (Opening Brief, pp. 4, 13, 22) that no such easy solution is permissible here.

In *Christensen v. Paramount Pictures, supra,* the judge decided the issue largely on the fact "the question has been decided by a federal district court in California and by the 9th Circuit." (*Cf.*: n. 9 thereof, citing *United West Coast Theatres, supra,* and *Burnham Chemical v. Borax Consolidated, supra.*)

In *Lyons v. Westinghouse Electric Corp.,* 2 Cir. 1955, 222 F.2d 184, *cert. denied,* 350 U.S. 825, Judge Learned Hand wrote, in an action for private triple damages under the antitrust laws, "The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a qui tam action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign." (*Id.* at 189.) And see Judge Pope's approval of such language, for this court, in *Mach-Tronics, Inc. v. Zirpoli* (9 Cir. 1963), 316 F.2d 820, 831-2.

Judge Levet pointed out in *Banana Distributors v. United Fruit, supra,* that Judge Cardozo, while on the state court, in *Cox v. Lykes Bros.,* 1924, 232 N.Y. 376, 143 N.E. 226 at 227-228, had stated:

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. Huntington v. Attrill, 146 U.S. 657, 667. . . The nature of the problem will determine whether we are to take one viewpoint or the other."

We have considered the great emphasis placed by appellants on two California cases, interpreting the State Cartwright Act; *Milton v. Hudson Sales Corp.*, 1957, 152 Cal.App.2d 418, 440, 313 P.2d 936, and *Rolley, Inc. v. Merle Norman Cosmetics, Inc.*, 1954, 129 Cal. App.2d 844, 849, 278 P.2d 63. The force of these exclusive dealing cases, say appellants, is that by them we are "simply referred back to the Federal cases." (Reply B., p. 5.) *Rolley* does that in determining the issue of a nonmonopolistic refusal to sell, because it says both the Cartwright Act (California Bus. & Prof. Code §§16600ff) and the Sherman Act, are basically restatements of common law, although the same reasoning does not apply to the Clayton Act. *Milton v. Hudson, supra,* holds: "There is little doubt that cases decided under the Sherman Act and the common law policy against restraint of trade are applicable to problems arising under the Cartwright Act." (*Id.* at 440.) But neither pass upon, nor approach, the statute of limitations question here involved, nor decide whether treble damage provisions (or, under state law Bus. & Prof. Code § 16750, double damage provisions) are penal or remedial.

In the Loevinger article[13] quoted in Judge Mathes' decision below, there is a reference in a concluding note to an article in Northwestern University Law Review, written by a practicing lawyer who has achieved noteworthy success in the prosecution of private antitrust actions.[14] In this article, criticism is made of "The

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[13]Loevinger, L., "Private Action—The Strongest Pillar of Antitrust," 3 Antitrust Bull. 167 (1958).

[14]McConnell, Thos. C., "The Treble Damage Issue: A Strong Dissent," 50 Northwestern University L. Rev. 342 (1955).

Report of the Attorney General's Committee to Study the Antitrust Laws (1955)." The author refers to page 379 of the report, where it is stated:

> "On balance, we favor vesting in the trial judge discretion to impose double or treble damages. *In all instances,* this would *recompense* injured parties. *Beyond compensation,* the trial court could then *penalize* the purposeful violator without imposing the harsh *penalty* of multiple damages on innocent actors." (Emphasis added.)

We are not here concerned with whether treble damages should or should not be permitted in private antitrust actions. Congress has decided they should be. We quote this portion of the report, and note the criticism thereof, not to prove or disprove the thesis it postulates, but to indicate the common acceptance among knowledgeable specialists in antitrust law of a belief that the trebling of damage constitutes a penal statute, and is more than remedial in nature.

The holding made by Judge Mathes, reversing his previous holdings, cannot, we firmly believe, be held clearly erroneous, and we affirm.

II

Nor do we think the trial court erred in holding the statute of limitations was not tolled during the pendency of the action entitled *United States v. Standard Oil Co. of California,* Civil No. 11854-C.

From *Steiner v. 20th Century Fox Film Corp., supra,* this court has already held:

(a) The general rules of collateral estoppel apply. "The tolling provision cannot be extended to matters

which *might* have been but were not complained of by the United States." (232 F.2d at 196.)

(b) What is contained in the two suits is determined by a comparison of the two complaints.

(c) "[T]he matters complained of in the private proceedings must be the same acts to achieve the same conspiracy complained of in the action brought by the United States. . . . The same means must be used to achieve the same objectives of the same conspiracies by the same defendants. . . ."[15] There must be "substantial identity of subject matter."[16]

None of these tests are met. (Compare Tr. pp. 2 to 24 and Tr. pp. 1136 to 1158.) For example, the defendants in the government suit were seven integrated oil companies and the Conservation Committee of California Oil Producers. Neither Shell Oil Company nor the Committee were involved in the instant action. As a second example, the conspiracy in the instant case allegedly started in 1948 and continued into 1954.

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[15]232 F.2d at 196. In this respect, the *Steiner* case and this circuit seem to go further than other circuits in holding that the words of the statute, "any matter complained of," refers to overt acts of the defendants complained of by the United States in its antitrust proceedings, not just the conspiracy behind the overt acts. *Cf.*: 57 Northwestern University L. Rev. 29 at p. 45.

[16]*Union Carbide & Carbon Corp. v. Nisley,* 10 Cir. 1961, 300 F.2d 561, 570, *cert. dism.* under Rule 60, 371 U.S. 801. *Cf.: New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.,* D.C. N.J. 1963, 216 F.Supp. 507.

In the government case, the alleged conspiracy commenced in 1936 and was concerned exclusively with events taking place prior to May of 1950. Thus, there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties.

III

We conclude appellants' action is barred by the statute of limitations; that it was not tolled; and that the judgment below so holding was not clearly erroneous, and is affirmed.

We do not reach the two additional points raised by appellees.

## APPENDIX B.

### Judgment.

United States Court of Appeals, for the Ninth Circuit.

Marc D. Leh, et al., Appellants, vs. General Petroleum Corp., et al, Appellees. No. 18333.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Div. and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

## APPENDIX C.

### District Court Opinion.

United States District Court
S. D. California,
Central Division.

Aug. 30, 1962.

Marc D. Leh, individually and the Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Plaintiffs, v. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Defendants. Civ. A. No. 20531-WM.

Mathes, District Judge.

Plaintiffs brought this action for treble damages under § 4 of the Clayton Act [15 U.S.C.A. § 15], alleging injury to their business proximately resulting from a combination or conspiracy among defendants to exclude and prevent plaintiffs from engaging in the wholesale distribution of gasoline in Southern California, in violation of §§ 1 and 2 of the Sherman Act [15 U.S.C.A. §§ 1 and 2]. Federal jurisdiction is invoked under 28 U.S.C. § 1337.

In addition to denying plaintiffs' allegations both as to the alleged tortious conduct and the alleged damage, defendants assert by way of affirmative defense that plaintiffs' action is barred by the applicable State statute of limitations [Fed.R.Civ.P. 8(c), 28 U.S.C.], and now move for a summary judgment of dismissal upon the defense of time bar [Fed.R.Civ.P. 56 (b)].

Plaintiffs allege that a conspiracy was initiated among defendants in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that defendants then and thereafter combined to exclude plaintiffs as wholesale distributors of this product, both by controlling sales to plaintiffs and by eliminating plaintiffs' sources of supply. All parties agree that plaintiffs' alleged cause of action accrued in February of 1954, and that the applicable State statute of limitations—unless suspended under § 5 of the Clayton Act [15 U.S.C.A. § 16, as amended, id. § 16(b) (1955)] by some similar proceeding "instituted by the United States"—commenced to run at that time [cf.: Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190, 194 (9th Cir. 1956); Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 207-208 (9th Cir. 1950), cert. denied, 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951)].

It was not until January 7, 1956, that the four-year Federal limitations period with respect to private causes arising under the antitrust laws became effective. [69 Stat. 283 (1955), 15 U.S.C.A. § 15b.] Four years was chosen for the Federal statute, since that period appeared to be "the average limitation for all the 48 States * * *." [See S.Rep. No. 619, 2 U.S.Code Cong. & Adm. News, 84th Cong., 1st Sess., pp. 2331-2332 (1955).]

The Act providing this new Federal statute of limitations declares that: "No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be reviewed by said sections." [15 U.S.C.A. § 15b.]

[1] Inasmuch as the cause at bar admittedly accrued in 1954, resort must be had to the applicable State statute of limitations in order to determine whether plaintiffs' action is "barred under existing law". [See: 28 U.S.C. § 725, as amended, id. § 1652 (1948); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397, 27 S.Ct. 65, 51 L.Ed. 241 (1906); Campbell v. City of Haverhill, 155 U.S. 610, 618, 15 S.Ct. 217, 39 L.Ed. 280 (1895); Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569, 576 (9th Cir. 1948), cert. denied, 336 U. S. 924, 69 S.Ct. 655, 93 L. Ed. 1086 (1949).]

Specifically, the problem is to determine which of two California statutes applies: one providing a three-year period to govern actions to recover upon a statutory liability "other than a penalty or forfeiture" [Cal. C.C.P. § 338(1)], and the other providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State * * *." [Cal. C.C.P. § 340(1)].

This action was commenced in September of 1956—more than two and one-half years after the date of accrual of plaintiffs' alleged cause—and so would be barred if deemed a statutory "penalty or forfeiture" within the meaning of the one-year limitation provisions of Cal. C.C.P. § 340(1). On the other hand, if the three-year period of Cal.C.C.P. § 338(1) is properly applicable, then the action was not "barred under existing law" as of the effective date of the 1955 Federal statute, and so defendants' plea of time bar would fail. [See 15 U.S.C.A. § 15b.]

The correct method whereby to determine which State statute of limitations is properly applicable to a cause arising under the antitrust laws prior to the Federal limitations statute has been the subject of some judicial disagreement. One view is that, inasmuch as the private antitrust action involves a Federal cause of action, whatever State limitations period is to be applied turns upon the Federal court's view as to the nature of the Federal action, as being either "remedial" or "penal". [Cf.: Fulton v. Loew's Inc., 114 F.Supp. 676, 682 (D.Kan.1953); Christensen v. Paramount Pictures, 95 F.Supp. 446, 449 (D.Utah 1950); see also Momand v. Universal Film Exchange, 43 F.Supp. 996, 1008-1009 (D.Mass.1942).] And since the Court concluded in the Chattanooga Foundry case, supra, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241, that actions for treble damages under the Federal antitrust laws are not subject to the general Federal statute of limitations governing actions to recover a "penalty" under the laws of the United States [28 U.S.C. § 791, as amended, id. § 2462 (1948)], it has been reasoned that a State limitations statute dealing with recovery of "penalties" in the State courts cannot in any event be applied to treble-damage claims grounded upon Federal antitrust violations. [See: Greene v. Lam Amusement Co., 145 F.Supp. 346, 348 (N.D.Ga.1956); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F.Supp. 506, 509 (D.Colo. 1952).]

The majority view, however, as formulated in recent years, holds that the question of limitations applicable to private antitrust actions was, as Mr. Justice Holmes put it, "left to the local law by the silence of the Statutes of the United States". [Chattanooga Foundry &

Pipe Works v. Atlanta, supra, 203 U.S. at 397, 27 S.Ct. 65.] Moreover, the word "penalty", as applied in a Federal statute such as 28 U.S.C. § 2462, obviously may have "a different meaning than the same word in the * * * [State] statute". [Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 788 (2d Cir. 1959), cert. denied, 361 U.S. 960, 80 S.Ct. 585, 4 L.Ed. 2d 542 (1960).] Accordingly, in keeping with the principle that statutory construction by a State's highest court is deemed an integral part of the text of the State's statute of limitations, it has been declared that Federal courts "must accept the statutes as construed and interpreted by the * * * [State] courts. It is for them to determine what is meant by the word 'penalty' in the * * * [State] statute." [Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785, 788 (2d Cir. 1959), cert. denied, 361 U.S. 960, 80 S.Ct. 585, 4 L.Ed.2d 542 (1960); cf.: Moore v. Illinois Central R. Co., 312 U.S. 630, 634, 61 S.Ct. 754, 85 L.Ed. 1089 (1941); Costello v. Bank of America, 246 F.2d 807, 812 (9th Cir. 1957).]

Adherence to the rationale just stated has required the Federal courts to compare the nature of the Federal treble-damage antitrust action with that of analogous State causes, as construed by the courts of the particular State involved, and from such a comparison to decide which local statute of limitations the courts of the State would deem applicable to actions embracing Federal treble-damage antitrust claims. [See: North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960); Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960); Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785; Gordon v. Loew's

Inc., 247 F.2d 451 (3rd Cir. 1957); Green v. Wilkinson, 234 F.2d 120 (5th Cir. 1956); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947, 72 S.Ct. 555, 96 L.Ed. 704 (1952); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y.1953); and see: Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802, 806 (6th Cir. 1961); Nomand v. Universal Film Exchanges, 172 F.2d 37, 47 (1st Cir. 1948), cert. denied, 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1949); United Banana Co. v. United Fruit Co., 172 F.Supp. 580, 585 (D. Conn. 1959); compare: Brady v. Daly, 175 U.S. 148, 20 S.Ct. 62, 44 L.Ed. 109 (1899); Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892).]

[2] A study of the decisions convinces me that the precedent of seeking guidance from the construction given a particular limitations statute by State courts is a sound one to follow in the case at bar, notwithstanding the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions. [See: North Carolina Theatres, Inc. v. Thompson, supra, 277 F.2d 673; Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785; Englander Motors, Inc. v. Ford Motor Co., 186 F.Supp. 82, 90 (N.D.Ohio 1960), modified on other grounds, 293 F.2d 802 (6th Cir. 1961).]

Turning, then, to the scope of the three-year [Cal. C.C.P. § 338(1)] and the one-year [Cal.C.C.P. § 340-(1)] statutes in question here, as construed by the State courts, it is noted that although the California courts have not as yet interpreted for limitations pur-

poses a similar private-action provision under the State's antitrust law [see Cal.Bus. & Prof. C. § 16750, as amended, Id. § 16750(a), (1959)], they have considered the applicability of both § 338(1) and § 340(1) on several occasions in cases involving circumstances closely analogous to those presented at bar. For example, a statutory provision for recovery of twice the amount paid to a decedent in excess of legally-incurred payments under the State Old Age Security Law has been characterized as "penal", and hence the one-year period of limitations specified in § 340(1) was held applicable. [Department of Social Welfare v. Stauffer, 56 Cal. App.2d 699, 133 P.2d 692 (1943).]

The same result was reached where "liquidated damages" were imposed by statute for failure of gas and electric companies to supply requisite power [Hansen v. Vallejo Electric Light & Power Co., 182 Cal. 492, 188 P. 999 (1920); compare Los Angeles County v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329 (1893)]; where court reporter fees were reduced for failure to comply with court rules [County of San Diego v. Milotz, 46 Cal.2d 761, 300 P.2d 1 (1956)]; and where a buyer sued for return of the amount paid under a conditional sale contract upon the seller's interference with payment of the balance of the debt prior to maturity [Stone v. James, 142 Cal.App.2d 738, 299 P.2d 305 (1956)].

The California courts have also characterized as "penal" a statutory provision for double damages in trespass actions involving timber [Helm v. Bollman, 176 Cal.App.2d 838, 1 Cal.Rptr. 723 (1959); cf. Swall v. Anderson, 60 Cal.App.2d 825, 141 P.2d 912 (1943)]; likewise a statutory provision for treble damages in actions for unlawful detainer [see: Hoban v. Ryan, 130

Cal. 96, 62 P. 296 (1900); Gwinn v. Goldman, 57 Cal. App.2d 393, 134 P.2d 915 (1943)], as well as for damages to adjacent property caused by fire [Clark v. San Francisco & S. J. Val. Ry. Co., 142 Cal. 614, 76 P. 507 (1904); see also Esposti v. Rivers Bros., 207 Cal. 570, 279 P. 423 (1929).]

While there has been no such concurrence of views as to the proper characterization of Federal treble-damage anti-trust actions [see: Schiffman Bros. v. Texas Co., 196 F.2d 695, 697 (7th Cir. 1952); Leonia Amusement Corp. v. Loew's Inc., supra, 117 F.Supp. at 756; and see Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167 (1958)], it is reasonable to characterize such actions as compensatory in part, and as exemplary or penal with respect to the trebling of damages to business or property resulting from antitrust violations [see Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2nd Cir.), cert. denied, 350 U.S. 825, 76 S.Ct. 52, 100 L. Ed. 737 (1955); cf. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955)].

Moreover, the California Supreme Court has characterized as a penalty "any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former". [Miller v. Municipal Court, 22 Cal.2d 818, 837, 142 P.2d 297, 308 (1943); see also Grossblatt v. Wright, 108 Cal.App.2d 475, 239 P.2d 19 (1951).]

The conclusion is thus impelled that § 340(1) of the California Code of Civil Procedure, as construed by the California courts, is applicable to treble-damage causes under the Federal antitrust laws which accrued

prior to the effective date of the four-year Federal limitations period. [15 U.S.C.A. § 15b.] Inasmuch as plaintiffs' cause of action admittedly accrued in February of 1954, and this action was not commenced until September of 1956, application of the one-year period specified in § 340(1) would clearly raise the time bar upon which defendants rely for summary judgment of dismissal.

Before this conclusion can be embraced, however, consideration must be given to the fact that our Court of Appeals for the Ninth Circuit has indicated on occasion that the proper California statute of limitations to be applied in Federal treble-damage antitrust actions is the three-year period provided in Cal. C.C.P. § 338-(1) [see Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at 578; compare Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1944)]; and has at other times adopted the mutual view of the parties to the particular action that § 338(1) governed. [Steiner v. 20th Century-Fox Film Corp., supra, 232 F.2d at 194; Suckow Borax Mines Consol. v. Borax Consolidated, supra, 185 F.2d at 207.] It is at once apparent that these cases antedate enunciation of the present majority view that State statutes of limitations should be applied as construed by the courts of the particular State. And analysis reveals that in none of these Ninth Circuit cases was the Court of Appeals required to choose between Cal.C.C.P. § 338(1) and § 340(1), since in each case the action was barred under both statutes by the lapse of more than three years. [See also Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9th Cir. 1936), cert. denied, 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937).]

Nor was it necessary for the District Courts in Manny v. Warner Bros. Pictures, 116 F.Supp. 807 (S.D.Cal.1953), and in Levy v. Paramount Pictures, 104 F.Supp. 787 (N.D.Cal.1952), to choose between § 338(1) and § 340(1), for in each instance the action was "barred by both sections". [Manny v. Warner Bros. Pictures, supra, 116 F.Supp. at 809; compare Aero Sales Co. v. Columbia Steel Co., 119 F.Supp. 693 (N.D.Cal.1954).]

In United West Coast Theatres Corp. v. South Side Theatres, 86 F.Supp. 109 (S.D.Cal.1949), it was assumed by both Court and counsel that the Federal treble-damage antitrust counterclaim was time-barred by either § 338(1) or § 340(1), unless the applicable California statute of limitations was suspended under either the Act of October 10, 1942 [56 Stat. 781; see 86 F. Supp. at 110-111], or § 5 of the Clayton Act [15 U.S.C.A. § 16; see 86 F.Supp. at 113]. It was also assumed, at least by the Court, and erroneously as it now appears, that the Court of Appeals had been called upon to decide the question, and had held § 338(1) to be the California statute of limitations properly applicable to actions for treble damages arising under the Federal antitrust laws. [See: 86 F.Supp. at 111 and Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at 578.]

[3] Worth repeating here is the venerable admonition of Mr. Chief Justice Marshall: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the

very point is presented for decision". [Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821); cf.: Armour & Co. v. Wantock, 323 U.S. 126, 132-133, 65 S.Ct. 165, 89 L.Ed. 118 (1944); Mutual Benefit Health & Accident Ass'n v. Bowman, 99 F.2d 856, 858 (8th Cir. 1938), cert. denied, 306 U.S. 637, 59 S.Ct. 485, 83 L. Ed. 1038 (1939); Julian Petroleum Corp. v. Courtney-Petroleum Co., 22 F.2d 360, 362 (9th Cir. 1927).]

[4] In the case at bar, "the very point is presented for decision": whether the three-year period provided in § 338(1), or the one-year period provided in § 340(1), is the California statute of limitations properly applicable to a treble-damage cause of action arising under the Federal antitrust laws and accruing prior to the effective date of the four-year Federal statute of limitations provided in 15 U.S.C.A. § 15b. Treating the question as *res integra*, as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both § 338(1) and § 340-(1), I must hold that the one-year period specified in Cal.C.C.P. § 340(1) is the California statute of limitations properly applicable to Federal treble-damage antitrust causes accruing prior to the effective date of the Federal four-year statute. [15 U.S.C.A. § 15b.]

[5] Plaintiffs' action is time-barred, then, unless operation of the statute of limitations was suspended by virtue of § 5 of the Clayton Act. [15 U.S.C.A. § 16.] Plaintiffs contend that, in all events, the statute of limitations was tolled during the pendency of a similar action commenced by the United States in this Court, in May of 1950, against defendant Standard Oil and

other companies. [See United States v. Standard Oil Company, et al., Civil No. 11584—C, S.D.Cal.]

At the time the cause of action here asserted by plaintiffs accrued, § 5 of the Clayton Act provided that: "Whenever any suit * * * is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit * * * shall be suspended during the pendency thereof." [15 U.S.C.A. § 16.]

This provision has been strictly construed so that "in order for the statute of limitations to be tolled for private litigants in antitrust conspiracy actions, the matters complained of in the private proceeding must be the same acts to achieve the same conspiracy complained of in the action brought by the United States. * * * A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants" [Steiner v. 20th Century-Fox Film Corp., supra, 232 F.2d at 196; cf.: Samuel Goldwyn Productions v. Fox West Coast Theatres Corp., 146 F.Supp. 905 (N.D. Cal.1956); Tague v. Balaban, 146 F. Supp. 356 (N.D. Ill.1956); see also: Philco Corp. v. Radio Corporation of America, 186 F.Supp. 155, 159 (E.D.Pa. 1960); United Banana Co. v. United Fruit Co., supra, 172 F.Supp. at 586.]

Applying these criteria, it is clear from comparison of the two cases that pendency of the Government's action in United States v. Standard Oil Company, et al., supra, Civil No. 11584—C, did not operate to suspend the statute of limitations in the case at bar. For in No. 11584-C the Government's charges were directed against an alleged agreement and combination among major oil companies intent upon eliminating competition among themselves, *inter alia,* by controlling prices and the production of petroleum products among independent producers and distributors; whereas, plaintiffs' claim at bar rests, not upon an alleged agreement by the defendant companies to control, but upon an alleged combination to exclude plaintiffs from wholesale gasoline distribution in the Southern California area.

Moreover, in No. 11584-C, the Government alleged that the combination to restrain and monopolize trade in crude and refined oil took form in the year 1936 and continued to the date in 1950 when the complaint was filed; while here plaintiffs allege a conspiracy initiated "in or about the year 1948" and extending to the date of commencement of plaintiffs' action in 1956. Furthermore, the defendants in both cases are not the same: Shell Oil Company and the Conservation Committee of California Oil Proceduers were joined as defendants in No. 11584—C, but not in the action at bar, and Olympic Refining Company was originally joined as a defendant in this case, but not in No. 11584-C. [Cf. Momand v. Universal Film Exchange, supra, 43 F. Supp. at 1011.]

Inasmuch as the one-year limitation period was not suspended by the pendency of the Government's suit in No. 11584-C, it follows that plaintiffs' action is time-barred by the provisions of Cal. C.C.P. § 340(1).

Accordingly, the defendants are "entitled to a judgment as a matter of law" [Fed.R.Civ.P. 56(c)], and the motion for a summary judgment of dismissal will be granted, without costs to any party.

The foregoing shall serve as findings of fact and conclusions of law [Fed.R.Civ.P. 52(a)], and defendants will lodge an appropriate judgment of dismissal with the Clerk, to be settled pursuant to Local Rule 7, within five days. This dismissal shall not constitute an adjudication upon the merits [Fed.R.Civ.P. 41 (b)], and the judgment will so provide.

## APPENDIX D.

The foregoing instrument is a
correct copy of the original on
file in this office.

ATTEST: Mar 19 1957

J. L. BROWN, COUNTY CLERK
County Clerk and Ex-officio Clerk of the
Superior Court of the State of California
in and for the County of Fresno
By James G. Huggins, Deputy

FILED
MARCH 10, 1957
J. L. BROWN, CLERK
By J. G. Huggins, Deputy

In the Superior Court of the State of California,
in and for the County of Fresno

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No. 97179 Dept. 2

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CHARLES S. EHRHORN, doing business as Navy Gas Co.,

Plaintiff,

vs.

CAMINOL COMPANY, a California corporation, WALTER ALLEN, VIRGIL ANDERSON, W. L. MARCONI, JULIAN C. MONTGOMERY, NELLA CORPORATION, A California corporation, SUNLAND REFINING CORPORATION, a California corporation, G. A. OLSEN, and DOES ONE to ONE HUNDRED,

Defendants.

**Memorandum and Order on Demurrers and Motions to Strike.**

The first cause of action is directed against all defendants and is based on the Cartwright Act. The

second and third causes of action, dealing separately with each of the two groups of defendants, are founded on the Unfair Practices Act.

Two main elements are required in pleading a civil action under the Cartwright Act—first, allegations showing a breach of the Statute, and, secondly, allegations showing damage to the plaintiff. The Court is of the opinion that the defendants are mistaken in their contention that there should be a third element explicitly pleaded, namely, injury to the public. A properly pleaded breach of the Act itself is a sufficient showing of injury to the public. But plaintiff is wrong in supporting that a breach of the Act may be pleaded wholly by general conclusions consisting largely of quotations from the law itself, and wrong in the assumption that a statement of general conclusions of damage to the plaintiff, together with a general averment of damages in the form usually employed in automobile collision cases, is sufficient as pleading. In this type of action it may be permissible to reinforce the pleading of proper facts by the addition of generalizations based on the words of the enactment which a Court might refuse to strike, but the absence of basic factual allegations is fatal to a pleading in a case of this kind. Here the potential factual nexus is so extensive and complex that it behooves a Court at the inception of the litigation, when proper objection is made by defendants, to insist upon a clarification of the position of the plaintiff. It is better to find out at the start whether the plaintiff, if he can prove his allegations, is entitled to recover, than to discover at the end of months of preparation and weeks of trial that the facts produced by the plaintiff do not support the mere general conclusions contained in his complaint.

With respect to the second and third causes of action, similarly, both the Court and the parties should be able to ascertain before the case goes to trial whether if the facts alleged are true the plaintiff has been legally discriminated against in the functional classification and the area in which he does business.

For these reasons, the general demurrers will be sustained.

The Court is of the opinion that the 3-year Statute of Limitations applies.

IT IS ORDERED that the motion of the defendants, Caminol Company, et al, to strike portions of the amended complaint, be, and it hereby is, granted as to the specifications set forth in their notice of motion and numbered 2, 7 to 17, inclusive, and denied as to all other specifications.

IT IS FURTHER ORDERED that the motion of the defendants, Sunland Refining Corporation, et al, to strike portions of the amended complaint be, and it hereby is, granted, as to the specifications set forth in their notice of motion and numbered 4, 6, 8 to 12, inclusive, and denied as to all other specifications.

IT IS FURTHER ORDERED that the demurrer of defendants, Caminol Company, et al, to the amended complaint, be, and it hereby is, sustained as to each and all of the following grounds set forth therein, to wit:

Demurrer to First Cause of Action—Paragraphs I, III (3), (4), (6), (8), (10) to (38) inclusive, (40) to (56) inclusive, IV and V.

Demurrer to Second Cause of Action—Paragraph 1 (to the extent of the specifications as to which the de-

murrer is hereinbefore sustained with respect to the first cause of action). Paragraphs, II, III (1), (3) to (9) inclusive, IV andV, and the demurrer is overruled as to all other specifications.

IT IS FURTHER ORDERED that the demurrer of defendants, Sunland Refining Corporation, et al., to the amended complaint, be, and it hereby is, sustained as to each and all of the following grounds set forth therein, to wit:

Demurrer to First Cause of Action—Paragraphs I, III, IV (4), (9) to (34) inclusive, V and VII.

Demurrer to Third Cause of Action—Paragraph I (to the extent of the specifications as to which the demurrer is hereinbefore sustained as to the first cause of action), Paragraphs II, IV, V (2) and (4), V and VI, and said demurrer is overruled as to all other specifications.

Plaintiff is allowed 20 days within which to serve and file a second amended complaint.

DATED: March 19th, 1957.

PHILIP CONLEY

Judge of the Superior Court

## APPENDIX E.

In the Supreme Court of the United States, October Term 1964, No. .....

Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Petitioners, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Respondents.

**Motion for Extension of Time Within Which to File Petition for Writ of Certiorari.**

*To the Honorable Justice of the Supreme Court of the United States Duly Alloted to the United States Court of Appeals for the Ninth Circuit:*

Petitioners move that the time within which they may file a petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, entered on the 2nd day of April, 1964, in the cause pending therein above-entitled, be extended from the 1st day of July, 1964, to and including the 1st day of August, 1964.

### JURISDICTION

The judgment of the Circuit of Appeals dated April 2, 1964, entitled "Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Appellants, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation,

Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Appellees", No. 18,-333 in the records of the Court of Appeals, was also filed and entered on April 2, 1964. A copy of the opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

## STATEMENT OF THE CASE

Petitioners' action is for treble damages under Section 4 of the Clayton Act (15 U.S.C. §15), arising from the alleged violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The Court of Appeals affirmed a judgment of dismissal below upon the ground that the Statute of Limitations had run against Petitioners. Since Petitioners' cause of action accrued no later than February, 1954, the four year Federal limitations period with respect to private causes of action under the Anti-Trust Laws is inapplicable. The questions presented are (i) What is the applicable Statute of Limitations, and (ii) Whether that Statute of Limitations was tolled or suspended under § 5 of the Clayton Act (15 U.S.C. §16, as amended 15 U.S.C. §16(b), 1955) by a similar proceeding "instituted by the United States."

## REASONS WHY THE GRANTING OF AN EXTENSION OF TIME IS DEEMED JUSTIFIED

1. This matter presents a serious question of characterization of the Anti-Trust Laws as penal or compensatory. The Court of Appeals comes out quite strongly in characterizing the Anti-Trust action as penal. This is contrary to the announced position of

this Court in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 1906, 203 U. S. 390, 397.

2. Several additional important and serious questions are presented:

(a) Whether resort must be had to State law for "Characterization" of the cause of action created by 15 U. S. C. § 15;

(b) Whether the Court of Appeals was correct in determining only whether the trial court's conclusion and opinion were "clearly erroneous", on what would appear to be a pure question of law;

(c) Whether the Court of Appeals ignored *United States v. Gerlach Livestock Co.*, 1950, 339 U. S. 725, 753, in determining the binding effect of a decision of the Superior Court of the State of California upon a Federal Court;

(d) What constitutes a similar proceeding "instituted by the United States" so as to toll or suspend the applicable Statute of Limitations.

3. That the attorney for petitioners is a sole practitioner, without partners or associates, and that he has diligently researched the above questions to prepare a Petition for Certiorari thereon, but that the complexity of the problems presented require additional time to complete writing of the Petition for Certiorari and printing thereof;

4. That additionally the attorney for petitioners is engaged in a jury trial which is estimated to last two weeks, and that during this time he will be unable to devote his full attention to the additional research and writing required on the Petition for Certiorari, but that the petition should be completed and filed within the additional thirty days requested.

5. That the opinion of the Court of Appeals clearly mis-applies, and in effect refuses to follow, the opinion of this Court in *Chattanooga Foundry & Pipe Works vs. City of Atlanta*, 1960, 203 U.S. 390, 397.

Respectfully submitted,

/s/ RICHARD G. HARRIS
Attorney for Petitioners

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EXHIBIT A

Supreme Court of the United States No. ....., October Term, 1964.

Marc D. Leh, et al., Petitioners, vs. General Petroleum Corp., et al.

**Order Extending Time to File Petition for Writ of Certiorari.**

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1964.

/s/ Arthur J. Goldberg
Associate Justice of the Supreme
Court of the United States.

Dated this 29th day of June, 1964.

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# In the Supreme Court

of the

# United States

OCTOBER TERM, 1964



No. [redacted] 4

MARC D. LEH, individually and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, copartners,

*Petitioners,*

vs.

GENERAL PETROLEUM CORPORATION, a corporation, et al,.

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief for Respondents in Opposition

HOWARD PAINTER
PAUL E. BERMINGHAM
811 West Seventh Street
Los Angeles, California
*Attorneys for Socony Mobil Oil Company, Inc.*

FRANCIS R. KIRKHAM
WILLIAM E. MUSSMAN
THOMAS E. HAVEN
225 Bush Street
San Francisco, California
*Attorneys for Sandard Oil Company of California*

GEORGE W. JANSEN
CHARLES E. BEARDSLEY
3350 Wilshire Boulevard
Los Angeles, California
*Attorneys for Texaco Inc.*

JACK E. WOODS
WILLIAM D. FOOTE
555 South Flower Street
Los Angeles, California
*Attorneys for Richfield Oil Corporation*

MOSES LASKY
RICHARD HAAS
111 Sutter Street
San Francisco, California
*Attorneys for Union Oil Company of California*

WAYNE H. KNIGHT
EDMUND D. BUCKLEY
550 South Flower Street
Los Angeles, California
*Attorneys for Tidewater Oil Company*

SORG PRINTING COMPANY OF CALIFORNIA, 190 FIRST STREET, SAN FRANCISCO 8

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October Term, 1964

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**No. 348**

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Marc D. Leh, individually and The Progress Company, a copartnership comprised of Marc D. Leh and David Brown, copartners,

*Petitioners,*

vs.

General Petroleum Corporation, a corporation et al.,

*Respondents.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief for Respondents in Opposition

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### STATEMENT OF THE CASE

In 1956 petitioners brought suit under section 4 of the Clayton Act for treble damages allegedly suffered as the result of a conspiracy among respondents (R. 2). Pretrial proceedings established that petitioners' complaint was based upon the alleged loss of a supply of gasoline

from respondent General Petroleum Corporation in 1954 (R. Tr. 412-413). Petitioners concede that the alleged cause of action accrued "no later than February, 1954" (Pet., p. 3). Respondents filed a motion for summary judgment on the grounds (1) that the undisputed facts developed by discovery established that petitioners had suffered no damage as the result of any acts of respondents, and (2) that the alleged cause of action was barred by the statute of limitations (R. 612). The District Court, without ruling on the first ground, sustained the motion on the second ground (App. to Pet., p. 33). The decision was affirmed by the Court of Appeals (App. to Pet., p. 1).

## QUESTIONS PRESENTED

1. Was this action governed by section 340(1) of the California Code of Civil Procedure which prescribes the statutory period for "An action upon a statute for a penalty * * * when the action is given to an individual" (as was held by the courts below), or by section 338(1) of the same code covering "An action upon a liability created by statute, other than a penalty * * *" (as is contended by petitioners)?

2. Was the statute of limitations in this case tolled by the pendency of *United States v. Standard Oil, et al.*, a civil antitrust suit brought by the Government in Los Angeles in 1950 and disposed of by consent decree as to six defendants in 1959, and by dismissal as to the remaining defendant in 1961?

## ARGUMENT

None of the grounds upon which this Court grants certiorari is, we submit, present in this case. There is no conflict of decisions. The question concerning the statute of limitations is an isolated question of state law which

cannot recur under a Federal statute which has been in existence for more than eight years. The decision of the Court of Appeals on this point, affirming the decision of the California District Court on a question of California law, is clearly correct. The decision of both courts on the question whether the statute was tolled by the pendency of the Government case is also clearly correct. The alleged conspiracies are not the same, the alleged conspirators are not the same, the alleged objectives are not the same, and the alleged acts are not the same (R. 2, 12, 1136). Indeed, petitioner does not argue to the contrary but simply attacks an earlier decision of the Court of Appeals (*Steiner v. 20th Century-Fox Film Corporation* (9 Cir. 1956) 232 F.2d 190) which has no application to the present case (Pet., pp. 17-28).

Prior to the Act of July 7, 1955, establishing a uniform period of limitation for actions brought under the antitrust laws (15 U.S.C. 15b), the applicable period of limitations was determined by local law (*Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390, 397). As there were 48 states, each with a variety of time periods for different kinds of suits variously described, with time and description varying from state to state, there was both uncertainty and lack of uniformity. It was to remedy this unsatisfactory situation that the Federal act was passed more than eight years ago.[1] Since, as all concede, that Act is not applicable to this action, the issue here was simply one of determining which of two sections of the California Code of Civil Procedure was the applicable one, section 340(1) or section 338(1).

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1. See Report of the Attorney General's National Committee to Study the Antitrust Laws, 1955, pages 380-383.

1. Under points I and II (Pet., pp. 4-11), petitioners argue that under Federal law an action to recover damages under the Sherman Act is not an action to recover a penalty (citing *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390), and that the courts below erred in applying state law "to determine the 'nature' of the private antitrust cause of action as penal or nonpenal" (Pet., p. 7).

Both courts below and respondents agree that the nature of a cause of action created by Federal law is a Federal question. But starting with the nature of the action as ascertained from Federal law, the question of which state statute of limitations applies to that kind of action is a matter of interpreting the language of the state statutes, which is a state question. When the problem was a live one, as it has long ceased to be, the courts reached a consensus to this effect. See, for example, *Gordon v. Loew's Incorporated* (3 Cir. 1957) 247 F.2d 451; *Powell v. St. Louis Dairy Company* (8 Cir. 1960) 276 F.2d 464; *North Carolina Theatres, Inc. v. Thompson* (4 Cir. 1960) 277 F.2d 673. And until their present petition, petitioners fully agreed with this consensus. The opinion of the Court of Appeals quotes the following from petitioners' Reply Brief before that court (App. to Pet., p. 19):

> "Everyone concedes that the problem is how a California court would characterize this action under the language of the two specific California statutes."[2]

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2. Petitioners seek to justify their change of position by referring to *Simler v. Conner* (1963) 372 U.S. 221. But that case is entirely consistent with the accepted rule which petitioner acknowledged in the courts below. There, in determining whether an action was "legal" or "equitable" for the purpose of applying the Federal constitutional guaranty of trial by jury, the Court looked to Federal law. That is, one looks to the law of the jurisdiction whose statute or constitution is being interpreted to determine its meaning. Here the statute interpreted was that of California.

Petitioners' present argument is answered in the cases cited above and numerous others involving the various state statutes of limitation which were applicable until passage of the Federal act. For example, in *Gordon v. Loew's Incorporated,* supra, at page 457, the court said:

> "It is suggested that section 4 of the Clayton Act cannot thus be held to be a penal statute because the Supreme Court of the United States held in Chattanooga Foundry & Pipe Works v. Atlanta, 1906, 203 U.S. 390, 27 S. Ct. 65, that the five years limitation upon suits 'for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise' imposed by the predecessor of section 2462 of title 28, United States Code, was not applicable to such a suit. It must, of course, be conceded that such a suit is not for a penalty within the meaning of the federal statute of limitations now incorporated in section 2462. But it does not follow that the law which authorizes such a suit to be brought may not be a penal statute within the meaning of section 2A:14-10 of the New Jersey Revised Statutes. For 'penal' and 'penalty' are not words of art. On the contrary, as is the case with many other terms used in the law, their meaning varies with the circumstances in which they are used and takes on the meaning in each instance which the user intends. See Huntington v. Attrill, 1892, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123. As an illustration we may point out that actions under the antitrust laws at other times and in other settings have been described by the federal courts as authorizing the recovery of a penalty. And indeed the fact that the antitrust laws had been held to be penal in respect to the application of the statutes of limitations of some states but not of others was one of the reasons why Congress in 1955 enacted the uniform statute of limitations applicable to these cases."

The question is not whether a Clayton Act suit is penal within the meaning of Federal law. "Penalty" was used in a

Federal statute of limitations in its "strict and primary sense" as referring *only* to suits by the Government and therefore *that* statute did not apply to Clayton Act suits.[3] But section 340(1) of the California Code of Civil Procedure obviously used the word in another sense for it speaks of an action "for a penalty * * * given to an individual." The question is what the Legislature of California meant by these words when it chose to use them as a mode of description. And the answer disclosed by an examination of the California cases interpreting and applying section 340(1) of the Code of Civil Procedure is that in these words California included actions for multiple damages (see the discussion of the California cases in the opinion of the Court of Appeals, App. to Pet., pp. 16-18).

2. Near the outset of its opinion the Court of Appeals stated that in an "attempt to prognosticate * * * the result at which a state court would arrive, we find many gray areas." And in determining this question, the court concluded that it would follow the decision of the District Court unless it was deemed "clearly erroneous."

Petitioners argue (Pet., pp. 11-12) that the law of a state is a question of law and that the Court of Appeals erred in applying the "clearly erroneous" test.

Petitioners simply misinterpret the opinion of the court below. The Court of Appeals recognized that the District Judge brought to his decision his many years of experience as a member of the California Bar. As Mr. Justice Holmes pointed out in the *Chattanooga Foundry* case, supra, page 398, "as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon

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3. This was specifically pointed out in *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390, 397, citing *Huntington v. Attrill* (1892) 146 U.S. 657, 688.

the Supreme Court of Tennessee." Notwithstanding the weight which the Court of Appeals properly accorded the decision of the District Court, it independently and carefully reviewed the California decisions (App. to Pet., p. 19):

> "We have examined the cases cited in the trial court's memorandum, and we believe they, and his reasoning based thereon, carry conviction."

3. Petitioners next refer to a statement by a California superior court judge in an unreported ruling on demurrer in the case of *Ehrhorn v. Caminol Company.* They contend (Pet. pp. 13-15) that the failure of the Court of Appeals to accept this statement as the law of California is in conflict with a footnote in *U. S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 753, in which this Court said that a "decree" by a California superior court "seems to fall" within those decrees binding upon Federal courts in diversity cases.

The *Ehrhorn* ruling was not a "decree" of any state court. What petitioners invoke is a mere unreported aside of a superior court of Fresno County, California. There defendants had filed a demurrer to a complaint asserting a claim under the state antitrust act, and the demurrer was sustained for failure to state a cause of action. If one were to go to the clerk's office in Fresno and look at the records, he would find that one of several grounds of the demurrer was the statute of limitations, that the judge sustained the demurrer on grounds other than the statute of limitations, and that, in his order, he said that he was of the opinion that the three-year statute applied. What his reasoning was does not appear, and at that time it was elementary California law that "Any matter inserted in the order other than the decision for or against the demurrer is surplusage and not to be regarded" (*Kritzer v. Lancaster* (1950) 96 Cal. App.

2d 1, 6, 214 P.2d 407). Furthermore, the order in *Ehrhorn* was not a final disposition of the case; indeed, it never was disposed of on its merits, for it was later dismissed for lack of prosecution. As the opinion of the Court of Appeals shows (App. to Pet., pp. 6-7), under California law a ruling, much less a gratuitous expression of view, by a superior court judge at an intermediate stage of a case is binding on no one, and even a final decision of a superior court is binding on no other superior court. A California superior court is not an appellate court but the lowest trial court of general jurisdiction. Each of the 58 counties of California has a superior court, and there are 345 superior court judges, each sitting alone. Superior court opinions are not reported. There is no digest of their decisions. As this Court said in *King v. Order of Travelers* (1948) 333 U.S. 153, 161:

> "• • • it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."

4. Petitioners' last question differs from the first five in that it assumes application of the California one-year statute but turns to the question whether the statute was tolled under section 5 of the Clayton Act (15 U.S.C. 16) by the pendency of *United States v. Standard Oil Company, et al.*, Civil No. 11584-C (S.D. Cal.). But what petitioners state on the subject has nothing whatever to do with the present case. Petitioners' presentation merely criticizes a decision of the Ninth Circuit rendered in 1956 (*Steiner v. 20th Century-Fox Film Corporation*, 232 F.2d 190). Certiorari to review the instant case is not an appropriate way to review *Steiner*. The decision of the Court of Appeals here did not require support of the principle of the *Steiner* case that petitioners assail and is not based on it.

Section 5 of the Clayton Act provides that whenever a proceeding by the United States under the antitrust laws is pending, the running of the statute of limitations is suspended respecting every private right of action "based in whole or in part on any matter complained of in said proceeding." The petition here fails to indicate wherein petitioners' action is based in any part on any matter complained of in *United States v. Standard.* Petitioners admit that no overt act of which they complain was involved in the Government's suit (Pet., p. 19), for the gist of their attack on *Steiner* is that no identity of overt acts is necessary. But the petitioners fail to point out any identity whatever *even between the conspiracies charged in the two cases.* In fact they were wholly different (R. 2, 12, 1136). As the Court of Appeals held (App. to Pet., p. 31):

> "Thus, there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties."

## CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated: August 28, 1964.

Respectfully submitted,

HOWARD PAINTER
PAUL E. BERMINGHAM
FRANCIS R. KIRKHAM
WILLIAM E. MUSSMAN
THOMAS E. HAVEN
GEORGE W. JANSEN
CHARLES E. BEARDSLEY
JACK E. WOODS
WILLIAM D. FOOTE
MOSES LASKY
RICHARD HAAS
WAYNE H. KNIGHT
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IN THE

# Supreme Court of the United States

October Term, 1965
No. 4

MARC D. LEH, individually, and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,

*Petitioners,*

*vs.*

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,

*Respondents.*

## BRIEF FOR PETITIONERS.

### Opinions Below.

The opinion of the District Court, constituting its findings of fact and conclusions of law [R. 1209-1227],[1] is reported at 208 F. Supp. 289 (1962). The opinion of the Ninth Circuit Court of Appeals [R. 4-26] is reported at 330 F. 2d 288 (1964).

[1]Since the record is not printed, references are to the original record.

## Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 2, 1964 [R. 3]. On October 19, 1964 this Court granted a petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, limited to Question 6 presented by the petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Question Presented.

Whether the applicable statute of limitations was tolled by Section 5 of the Clayton Act during the pendency of the Government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C)?

## Statutes Involved.

The relevant paragraph of Section 5 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), reads as follows:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended

hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

**Statement.**

Petitioners by complaint filed September 28, 1956, alleged that a conspiracy was initiated among respondents in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that respondents then and thereafter combined to exclude petitioners from the wholesale distribution and sale of gasoline, both by controlling sales to petitioners and by limiting petitioners' sources of supply [R. 2-27, Vol. II-V]. It is conceded that petitioners' cause of action accrued no later than February, 1954, and that the applicable statute of limitations commenced to run at that time, unless suspended under Section 5(b) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), by a similar proceeding "instituted by the United States".

Petitioners contend that the similar proceeding which during its pendency suspended the applicable statute of limitations was *United States v. Standard Oil Company of California et al.* (Civil No. 11584-C) [R. 1136-1158, Vol. II-V].

It is conceded that the four-year limitations period with respect to private causes of action under the antitrust laws, Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. §15b (1964 ed.), is inapplicable to a cause accruing in 1954.

Respondents by answer denied petitioners' allegations and asserted by way of affirmative defense that peti-

tioners' action was barred by the applicable statute of limitations [R. 98-157, Vol. II-V]. Subsequently respondents moved for a summary judgment of dismissal upon the defense of time bar [R. 612-616; 1182-1183; Vol. II-V], which motion was granted [R. 1209-1227, Vol. II-V], and from which an appeal was prosecuted to the United States Court of Appeals for the Ninth Circuit.

The district court held that the applicable Statute of Limitations was California Code of Civil Procedure §340(1) providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, . . ." (208 F. Supp. at 294). The Ninth Circuit affirmed, stating that the holding of the district court cannot "be held clearly erroneous" (330 F. 2d at 301).

Both courts held that the statute of limitations was not tolled by Section 5(b) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), during the pendency of the government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C).

## Summary of Argument.

In holding that the statute of limitations was not tolled by Section 5(b) of the Clayton Act during the pendency of the government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C), both the district court and the Ninth Circuit Court of Appeals relied upon and applied the strict construction of Section 5(b) laid down by *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956). The *Steiner* case was wrongly decided and is in conflict with decisions of the Seventh and Tenth Cir-

cuits. Its requirement of collateral estoppel has been repudiated by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 85 S. Ct. 1473 (1965).

The "plain meaning" of Section 5(b) of the Clayton Act is that the statute of limitations is tolled during the pendency of a government action if the private antitrust right of action is based "in part" on the government action. This interpretation of Section 5(b) gives effect to the clearly expressed congressional desire that private parties be permitted the benefits of prior government actions.

A comparison of the allegations of the amended complaint in the government case with the allegations of the amended complaint in petitioners' action, and petitioners' memorandum of contentions of fact and law, shows conclusively that petitioners' action is based "in part" on the government action. The arguments made by respondents in the Ninth Circuit Court of Appeals are based in large part upon the repudiated notions of collateral estoppel and are without merit. Since petitioners' action is based at least "in part" on the government action, the statute of limitations was tolled by Section 5(b) of the Clayton Act during the pendency of the government action.

## ARGUMENT.

### I.

### The Steiner Case Was Wrongly Decided.

*Steiner v. 20th Century Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956), involved a suit brought by the lessor of a movie theatre against individual lessees and various theatre corporations for monopolizing the exhibition of motion pictures by, among other things, the leasing of theatres for less than a fair rental. Plaintiff lessor claimed that she had been coerced into accepting a low rental by threats that otherwise her theatre would not get first-run pictures and that a competing theatre would be built to show first-run pictures.

The "pivotal issue" was whether plaintiff's claim was barred by the statute of limitations, or whether the running of that statute had been tolled under 15 U. S. C. §16 during the pendency of *United States v. Paramount Pictures*, Equity No. 87-273 (D.C.S.D.N.Y.).

The court held that plaintiff had not alleged a case sufficiently similar to the *Paramount* case to toll the statute of limitations. The court said: "A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F.2d at 196.

To the extent that *Steiner* appears to require a private plaintiff who would toll the statute of limiations to plead the same overt acts as the Government has pleaded, it cannot be correct. The Government doesn't have to plead any overt acts whatever. The cases are collected in footnote 59 to *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S. Ct. 811, 845 (1940)

In evolving its stringent *Steiner* test, the court relied in part on *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). This reliance was misplaced. In *Christensen,* the District Judge held that the Utah statute of limitations was tolled by 15 U. S. C. §16, as to defendants named in the *Paramount* complaint. The portion of the *Christensen* case apparently referred to in *Steiner* appears at 95 F. Supp. at 455. It reads: "When Congress used the words 'any matter complained of' it referred to acts of the *named* defendants of which the Government might complain in any suit or proceeding." (Emphasis supplied.) The distinction under consideration was the difference between "named" and "unnamed" defendants. It had nothing to do with a distinction between the defendants' conspiracy and the overt "acts" which they may have committed in furtherance of that conspiracy.

*Momand v. Universal Film Exchange,* 43 F. Supp. 996 (D. Mass. 1942), particularly pages 1011-1013, was also relied upon by the court in *Steiner.* A close reading of those pages will reveal that with respect to a number of the plaintiff's causes of action, the statute of limitations was deemed to have been tolled. To be sure, the court in *Momand* did exclude other causes of action from the tolling provisions of 15 U. S. C. §16. The decision cannot, however, be taken as an authoritative statement of the law in view of the trial court's statement:

> "Since judgments there could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act." 43 F. Supp. at 1012.

This statement is incorrect. It was laid to rest in the last term of this Court:

> "Moreover, under §5(a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation appears in the tolling provision. It applies to every private right of action based in whole or in part on 'any matter' complained of in the government suit."
>
> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316-17, 85 S. Ct. 1473 (1965).

In addition to the above two District Court cases, which do not upon analysis offer any foundation for *Steiner*, the court relied upon the legislative history of the statute. The Ninth Circuit said:

> "In writing this provision ('any matter complained of') Congress made reference to the matters complained of in the public conspiracy action, not the conspiracy itself." See 232 F. 2d at 196.

If the statement refers to the preceding quotation from H. R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, then it is without support in the whole passage from which the quotation is taken. If it refers to some other expression of Congressional intent, then it is not supported by a citation.

The quotation from the House Report is part of a discussion which reads, in whole, as follows:

> "Section 6 provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor

for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.

"It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."

The "wrongful acts of the defendant" mentioned in this passage are the acts which cause the plaintiff's injury. Such acts must of course be pleaded and proven by a private plaintiff before he can recover damages. But the passage does not suggest that any particular acts (other than a "conspiracy itself," in the languge of *Steiner*) must be pleaded or proven in the Government case. On this latter point, the passage is simply silent. And the case law is settled: The Government makes its case by pleading and proving the conspiracy alone, without showing any overt acts whatever. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S. Ct. 811, 845 (1940), footnote 59, and cases cited.

Finally, the Ninth Circuit itself in *20th Century Fox Film Corp. v. Goldwyn,* 328 F. 2d 190, 219-220, fn. 58 (9th Cir. 1964), has recently intimated that it may agree that the *Steiner* case was wrongly decided:

> "58. It is therefore unnecessary for us to decide whether this is likewise true with regard to conspiracies to exclude independently produced films from affiliated theatres, as charged in other sections of the *Paramount* complaint. Nor, in view of the disposition which we have made of this matter, do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required."

## II.

## The Steiner Case Is in Conflict With Decisions of the Seventh and Tenth Circuits.

The month after the Ninth Circuit decided *Steiner v. 20th Century Fox Film Corp., supra,* the Seventh Circuit decided the case of *Grengs v. 20th Century Fox Film Corp.,* 232 F. 2d 325 (7th Cir. 1956), cert. denied 352 U. S. 871, 77 S. Ct. 96 The *Grengs* case was a treble damage action brought by a former motion picture exhibitor who alleged that he had been run out of business by a conspiracy which embraced both some *Paramount* case defendants and some local exhibitors who had not been parties to the *Paramount* case. The trial court dismissed as to all defendants. On review, the Seventh Circuit analyzed a number of the statute of limitations problems and concluded that plaintiff's

causes of action were barred as to certain defendants but not as to others. In comparing the plaintiff's complaint with the Government complaint in the *Paramount* case, the court said:

> "(Plaintiff's) amended complaint sets forth a right of action arising under the antitrust laws of the United States and, in so doing, *duplicates violations* of said laws charged against the same distributor defendants in the Paramount case. Thus plaintiff sets forth a private right of action which is, at least in part, grounded on the same matters of which the Government complained in the Paramount case." 232 F. 2d at 330 (Emphasis added).

Just what were those "violations" which Grengs' complaint "duplicated"? The only such "violations" which were pending in the *Paramount* case for long enough to help Grengs were the defendant's "vertical integrations." (See 232 F. 2d at 333 where the court said:

> "Thus it was . . . determined that the vertical integrations were active aids to the conspiracy . . . (and were) therefore violations of the act. The amended complaint herein charges such vertical integrations . . . Hence this action was not barred by the statute of limitations . . .").

Thus it can be seen that the *Grengs* case is clearly inconsistent with the *Steiner* case. *Steiner* insists that "the same means must be used to achieve the same objectives of the same conspiracies by the same defendants" (232 F. 2d at 196). The *Grengs* case represents the better rule.

The Tenth Circuit has also recently addressed itself to the problem. In the case of *Union Carbide and*

*Carbon Corp. v. Nisley,* 300 F. 2d 561 (10th Cir. 1962), that court considered the *Steiner* case, but refused to follow it. The *Nisley* court rejected the idea that a private plaintiff should "be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result." 300 F. 2d at 570.

The Tenth Circuit held in the *Nisley* case that "there was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570. This is a broad test, and wholly incompatible with the test propounded by *Steiner.*

## III.

## The Plain Meaning of the Statute.

Section 5(b) of the Clayton Act provides that, when the government proceeds,

> "the running of the statute * * * in respect of every private (anti-trust) right of action * * * based in whole or in part on any matter complained of in (the government) * * * proceeding shall be suspended during the pendency thereof. . . ."
>
> 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.).

The plain meaning of this statute is clear enough. If petitioners' private right of action was even partly based upon any matter complained of in *United States*

*v. Standard Oil Company of California, et al.,* Civil No. 11584-C, then the statute of limitations was tolled during the pendency of the Government case.

A "plain meaning" interpretation of the antitrust statutes was endorsed by this Court in *Radovich v. National Football League,* 352 U.S. 445, 454, 77 S. Ct. 390, 395 (1957), as follows:

> ". . . Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp. v. General Motors Corp.,* 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

A "plain meaning" interpretation of the tolling provisions of the statute serves an important public policy. As the Court said in *Christensen v. Paramount Pictures, Inc.,* 95 F. Supp. 446, 454 (D. Utah, 1950):

> "Tolling the statute of limitations protects the plaintiff while his right of action ripens, and rewards him for withholding his suit at a time when it is the policy of the law to free the defendant from its annoyance."

If the tolling provisions of 15 U.S.C. §16 are narrowly construed, the well-advised plaintiff will sue promptly as soon as the filing of the Government suit makes it appear that he may have a cause of action. He will not risk the possibility that the statute of limitations is running against his claim during the pendency of the Government suit. As a consequence, the defendant in the Government suit will likely find that he is a

defendant in many private suits brought by plaintiffs anxious to protect their rights of action. This cannot be the result which Congress intended.

The district court in the instant case recognized that *Steiner v. 20th Century-Fox Film Corp., supra,* "strictly construed" §5 of the Clayton Act (208 F. Supp. at 294). Only last term this Court stated that, where two interpretations are possible, and Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed co[illegible]essional purpose while the other defeats it, the interpretation effecting the congressional purpose is to be adopted.

> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 321, 85 S. Ct. 1473, 1478 (1965).

The "pivotal question" for determination, in such an event, was expressed by the Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 321, as: "(W)hether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." And the court said at page 320 of the same decision:

> "In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions."

The only test applied by the Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* was whether New Jersey Wood's claims were bas d "in part" on the Commission action involved therein. That is the plain meaning of the statute. Petitioners submit that the "plain meaning" test should be applied in the instant case.

## IV.

**The Statute of Limitations Was Tolled by §5(b) of the Clayton Act During the Pendency of the Government's Action in United States v. Standard Oil Company of California, Et Al. (Civil No. 11584-C).**

The amended complaint in the government case [R. 1136-1158, Vol. II-V] charges the defendants there named with, among other things:

1. Stabilizing the amount of crude oil to be produced through the Conservation Committee of California Oil Producers and through establishment of production quotas [Pars. 70a(1)(a) and (c); R. 1151, Vol. II-V].

2. Sharing wholesale and retail markets in the sale of gasoline by standardizing the various grades, qualities and structure of gasoline and by selling gasoline and other refined products at identical prices [Pars. 70a (5)(a) and (c); R. 1152, Vol. II-V].

3. Fixing and maintaining uniform and non-competitive prices for the sale of gasoline by causing the posting of an agreed price for each type and grade of gasoline at wholesale distribution points, and by causing each other to post and charge identical prices at such points [Pars. 70a(6)(a) and (b); R. 1152, Vol. II-V].

4. Fixing and maintaining uniform and non-competitive resale prices to be charged consumers by retailers handling gasoline [Pars. 70a(7); R. 1152, Vol. II-V].

5. Maintaining agreed upon wholesale and retail prices by refusing to sell gasoline to any wholesale or retail distributors who refused to follow the prices fixed

and by adopting the uniform policy of refusing to sell gasoline to any wholesale distributor, jobber, or retail dealer who would not agree to sell the products of a single defendant major on an exclusive dealing basis [Pars. 70a (8) (a) and (b); R. 1152, Vol. II-V].

6. Limiting the amount of crude oil which independent producers might produce through the Conservation Committee of California Oil Producers [Pars. 70b (1); R. 1152, Vol. II-V].

7. Purchasing the capital stock or assets, or both, of independent refiners, inducing independent refiners to shut down their productive capacity in return for an agreement to furnish such independent refiners with their requirements of gasoline, acquiring the operating and management control of competing independent refineries under various contractual arrangements, refusing to sell crude oil to independent refiners, limiting the supply of crude oil available to independent refiners through prorates imposed by the Conservation Committee of California Oil Producers, imposing a squeeze upon independent refiners by temporarily raising the price of crude oil while maintaining the existing price of gasoline, thus eliminating the profit margains of independent refiners, and foreclosing independent wholesale and retail markets otherwise available to independent refiners by requiring independent jobbers, wholesalers, and retailers to handle exclusively the refined petroleum products of the defendant majors [Pars. 70b (6), (7), (8), (10), (11), (12) and (15); R. 1153-1154, Vol. II-V].

Petitioners' amended complaint [R. 12-27, Vol. II-V] charges that the defendants there named engaged in an unlawful combination and conspiracy unreasonably to

restrain trade and commerce in the interstate distribution and sale of refined gasoline, and agreed:

1. To exclude independent jobbers of refined gasoline from the distribution thereof by eliminating their source of supply and by forcing them out of the market;

2. To eliminate the customers of independent jobbers (*i.e.*, retailers) by refusing to sell gasoline to independent jobbers for sale to retailers and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

3. To exclude the customers of independent jobbers (*i.e.*, retailers) from competing with retail outlets owned and operated by the defendants by shutting down and controlling the supply of gasoline to independent jobbers and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

4. To obtain monopolistic control over the supply, distribution and sale of gasoline sold through retail outlets in the Southern California area by refusing to sell refined gasoline to independent jobbers, or their customers, and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

5. To obtain prohibitive and non-competitive profits from the wholesale and retail sale of refined gasoline by eliminating the sale and distribution of gasoline through independent jobbers, by controlling the outlets

through which retail sales of gasoline are made, and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

6. To deprive the general public of the advantages of a competitive market for the retail purchase of refined gasoline by fixing and controlling the supply and price of gasoline flowing to and available for distribution by independent jobbers.

7. To prevent and retard the development of wholesale distribution of gasoline throughout the Southern California area by controlling the supply of gasoline in the Southern California area, controlling the retail outlets through which gasoline is marketed, and fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

Petitioners' amended complaint [R. 12-27, vol. II-V] further alleged that the defendants there named accomplished the objects and purposes of their unlawful activities by the following acts:

1. Controlling the sale and distribution of refined gasoline in the Southern California area;

2. Denying independent jobbers access to a source of supply of refined gasoline;

3. Preventing independent jobbers from obtaining refined gasoline from other sources;

4. Preventing the customers of independent jobbers (*i.e.*, retailers) from obtaining gasoline with which to compete with retail service stations and outlets operated or controlled by the defendants there named;

5. Maintaining fixed, artificial and uncompetitive prices for the wholesale and retail sale of refined gasoline in the Southern California area;

6. Destroying any substantial competition afforded defendants in the wholesale and retail selling and marketing of refined gasoline in the Southern California area;

7. Controlling the sources of refined gasoline in the Southern California area and preventing and precluding independent jobbers from obtaining source and supply.

In addition, petitioners' memorandum of contentions of fact and law, on file since September 10, 1959, states that petitioners rely upon:

1. Refusal by the major defendants and their resellers to sell to service stations which are operated strictly on a "self-serve" basis or to the suppliers of such service stations [R. 282, Vol. II-V].

2. Computation by the major defendants of the price paid per gallon by independent jobbers for gasoline by deducting an allowance from the appropriate posted tank wagon or tank truck price of the major defendants [R. 283, Vol. II-V].

3. Predatory price cutting by the major defendants [R. 284, Vol. II-V].

4. Granting by the major defendants of special allowances in price war areas to their conforming dealers [R. 284, Vol. II-V].

5. Attempts by the major defendants to maintain a two-cent price margin between their retail

prices and the prices of self-serve stations [R. 285, Vol. II-V].

6. Attempts by the major defendants to direct and control the customers and business of their re-brand distributors and sub-distributors at the wholesale and retail level [R. 285, Vol. II-V].

7. Policing of the market by the major defendants by field surveys and reporting from dealers and distributors [R. 286, Vol. II-V].

8. Refusal by the major defendants to sell to "split pump" stations [R. 286, Vol. II-V].

9. Uniform prices and price moves by the major defendants [R. 287, Vol. II-V].

10. Use by the major defendants of a wholly artificial and fictitious tank wagon or tank truck price [R. 287, Vol. II-V].

11. Use by the defendant Standard Oil Company of California, and at least some of the other major defendants, of consignment agreements rather than purchase and sale contracts to achieve vertical price fixing [R. 288, Vol. II-V].

12. Acquisition by the major defendants by systematic and parallel action of the crude oil supply of the independent refiners in the Southern California area, thereby converting the independent refiner into a jobber with a fixed supply of gasoline [R. 288, Vol. II-V].

13. Attempts by the major defendants to direct and control the price of their distributors and sub-distributors of gasoline at wholesale and retail [R. 289, Vol. II-V].

14. Use by the major defendants of "clearance letters" to be obtained from each other before taking on new business [R. 289, Vol. II-V].

15. Participation by the major defendants in the program of the Conservation Committee of California Oil Producers [R. 289-290, Vol. II-V].

16. Determination by each of the major defendants of the price which it will pay for crude oil at a particular field in accordance with prices posted by others of the defendants or the Shell Oil Company [R. 290, Vol. II-V].

17. Uniform acquisition by the major defendants of retail outlets [R. 290, Vol. II-V].

18. Uniform refusal by the major defendants to permit their brand names to be displayed by independent dealers obtaining their gasoline through independent jobbers. [R. 290, Vol. II-V].

The above comparison would seem to show overwhelmingly that petitioners' right of action is based at least in part upon matters complained of in the government proceeding. Defendants in the Ninth Circuit Court of Appeals, however, basing their argument on *Steiner v. 20th Century-Fox Film Corp., supra,* urged four distinctions between petitioners' right of action and the government proceeding, none of which, petitioners submit, is controlling here.

Firstly, defendants pointed out that petitioners' case was premised on a conspiracy alleged to have been formed in 1948, while the government's complaint charged a conspiracy formed in 1936 [R. 1151, Vol. II-V]. In *Philco Corp. v. Radio Corp. of America,* 186 F. Supp. 155 (E. D. Pa. 1960), however, the

Court found no difficulty in construing plaintiff's complaint to include allegations of a smaller conspiracy within a larger conspiracy. Beyond this, the government complaint alleges a conspiracy beginning in or about the year 1936 and continuing thereafter up to and including the date of filing of the complaint in May, 1950 [R. 1151, Vol. II-V]. Thus, the government alleges that the conspiracy charged by it was in progress in 1948, the year petitioners allege the conspiracy charged in their complaint to have been formed.

Adopting a "plain meaning" test, can there be any doubt, from the comparisons above set forth, that petitioners and the government are talking about the same thing? The government charges a vast combination and conspiracy involving the Pacific States Area, defined as the states of California, Oregon, Washington, Nevada and Arizona [R. 1137, Vol. II-V]. Petitioners' complaint is primarily concerned with the reaction of the defendants to "self-serve" gasoline stations, a post-war phenomenon.

However, given a conspiracy alleged to have been formed in 1936 between the defendants named in the government complaint, involving the five western states, and continuing from 1936 to and including May, 1950, to then say that this conspiracy did not progress beyond the economic realities and conditions of 1936, and did not react to "self-service" gasoline stations and the activities of petitioners herein, and others similarly situated, is to utter an absurdity. Common-sense tell us that petitioners are simply complaining about the effects on them, in 1948, of the agreements, decisions and actions made and taken in 1948 to meet the "self-service" threat, by the huge conspiracy alleged by the government to have been originally formed in 1936.

Second, in the Ninth Circuit Court of Appeals, respondents relied upon the fact that the alleged conspirators in this case and in the government case are not identical. In the government case, the Shell Oil Company and the Conservation Committee of California Oil Producers were defendants and alleged conspirators [R. 1139-1140, Vol. II-V], but they are not named in the instant case. Additionally, the Olympic Refining Company was not named in the government's case, but was made a defendant here [R. 12-27, Vol. II-V], although now dismissed from this case [R. 607, Vol. II-V].

However, this argument is based upon the statement in *Steiner v. 20th Century-Fox Film Corp., supra,* at 196, that the "general rules of collateral estoppel apply." The premise of the argument was repudiated by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 316, where this Court stated:

> "Moreover, under §5(a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation appears in the tolling provision. It applies to every private right of action based in whole or in part on 'any matter' complained of in the government suit."

Thirdly, respondents in the Ninth Circuit Court of Appeals argued that the conspiracy alleged here was different from that complained of in the government case. The allegations of petitioners' amended complaint and petitioners' memorandum of contentions of fact and law have been set forth above, as have certain of

the allegations of the government's amended complaint. They will not be here repeated. However, in the words of this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 322, "(c)ertainly the allegations (of petitioners' action) are based 'in part' on the . . . (government) action."

Finally, respondents argued in the Ninth Circuit Court of Appeals that the Government's case was concerned exclusively with events alleged to have occurred prior to May of 1950, while petitioners alleged that the final cut-off of their supply of gasoline occurred in 1954. Under this argument there could be no tolling of the statute of limitations as to events occurring subsequent to the filing of the government action. In addition to being manifestly absurd, the argument falls for two other reasons. First, it is based on the premise of collateral estoppel which, as has already been pointed out, was repudiated by this court as to §5(b) of the Clayton Act in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra.* Second while the language is admittedly somewhat ambiguous, the quotation from H.R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, relied upon by the Court in *Steiner v. 20th Century-Fox Film Corp., supra,* at 196, would seem to belie such an interpretation:

> "This section (Section 6) also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant *during* the pendency of the suit instituted by or on behalf of the United States" (Emphasis added).

Finally, as a matter of policy in construing the anti-trust laws, petitioners submit that an interpretation of §5(b) of the Clayton Act which would limit tolling of the statute of limitations only to acts occurring up to, but not after, the filing of the government complaint, would flout "the clearly expressed desire that private parties be permitted the benefits of prior government actions."

> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320, 85 S. Ct. 1473, 1478 (1965).

Petitioners therefore submit that their action is based at least "in part" on the government action. Nothing more is required under the "plain meaning" of Section 5(b) of the Clayton Act.

## Conclusion.

For the foregoing reasons, it is respectfully submitted that the decisions of the district court and the Ninth Circuit Court of Appeals should be reversed.

August, 1965.

RICHARD G. HARRIS,
*Attorney for Petitioners.*

*Of Counsel:*
MAXWELL KEITH,

# In the Supreme Court of the United States

OCTOBER TERM, 1965

**No. 4**

MARC D. LEH, individually, and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,
*Petitioners,*

vs.

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,
*Respondents.*

## Brief for Respondents

PAUL E. BERMINGHAM,
150 East 42nd St., New York 17, N.Y.
HOWARD PAINTER,
811 West Seventh St., Los Angeles, Calif.
*Attorneys for General Petroleum Corporation.*

FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,
225 Bush St., San Francisco 4, Calif.
*Attorneys for Standard Oil Company of California.*

GEORGE W. JANSEN,
110 Laurel Street, San Diego, Calif.
*Attorney for Texaco Inc.*

JACK E. WOODS,
WILLIAM D. FOOTE,
555 South Flower St., Los Angeles, Calif.
CLARK HEGGENESS,
120 Linden Ave., Long Beach, Calif.
*Attorneys for Richfield Oil Corporation.*

MOSES LASKY,
RICHARD HAAS,
111 Sutter St., San Francisco 4, Calif.
*Attorneys for Union Oil Company of California.*

EDMUND D. BUCKLEY,
4201 Wilshire Blvd., Los Angeles, Calif.
WAYNE H. KNIGHT,
550 South Flower St., Los Angeles, Calif.
*Attorneys for Tidewater Oil Company.*

*Attorneys for Respondents*

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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*Respondents.*

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## Brief for Respondents

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### ARGUMENT

**The Government Case.**

In 1950 the United States filed a civil proceeding against the Conservation Committee of California Oil Producers and seven major oil companies operating on the West

Coast.[1] The complaint charged generally, in the language of the Sherman Act, that commencing in 1936 and continuing to 1950 the defendants combined and conspired to monopolize and restrain trade in the production, transportation, refining and marketing of crude oil and petroleum products in the five far western states and had monopolized such trade (par. 69, R.V. 1151, Resp.App. 58). The suit sought divestiture of the defendant oil companies' retail marketing activities (Prayer 17; R.V. 1157; Resp.App. 70).[2] Following the general allegations, paragraphs 70a and 70b of the Government complaint, in 22 separate numbered subparagraphs (subdivided into a total of 38 subparagraphs), specified with particularity the terms of the conspiracy and monopolization alleged (R.V. 1151-1154; Resp. App. 58-64). The only terms of this conspiracy which pertain to marketing of gasoline and other products are in subparagraphs (5), (6), (7) and (8) of paragraph 70a (R.V. 1152; Resp.App. 60-61).[3] These subparagraphs of para-

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1. *United States v. Standard Oil Company of California, et al.*, Civil Action No. 11584-C, United States District Court for the Southern District of California.

In the appendix to this brief we print the amended complaint in the Government case (R.V. 1136; Resp.App. 29), and petitioners' complaint (R.II, 2, Resp.App. 1), amended complaint (R.II, 12; Resp.App. 11), a part of petitioners' Memorandum of Contentions of Fact and Law (R.III, 278; Resp.App. 24) and excerpts from the transcript of proceedings before the district court (R.XI, 326, Resp. App. 74). In this brief we shall refer to this appendix as "Resp. App."

2. After extensive pretrial hearings, the district court dismissed the case as to the Conservation Committee (1959 CCH Trade Cases, par. 69,240) and held that divestiture would not be decreed (1958 CCH Trade Cases, par. 69,212). Thereafter the remaining defendants, except Texaco, Inc., entered into a consent judgment (1959 CCH Trade Cases, par. 69,399). The case as to Texaco, Inc., was dismissed in 1961.

3. Paragraph 70b of the complaint alleges a conspiracy directed solely at independent producers and independent refiners (R.V. 1154; Resp.App. 61).

graph 70a alleged that the major oil companies agreed *"to eliminate competition among themselves"* by (subparagraph (5)) sharing wholesale and retail gasoline markets with each other by standardizing the grades of gasoline and other products, and by selling at identical prices, thus confining competition to advertising and services; (subparagraph (6)) fixing uniform prices for gasoline and other products by causing one company to post agreed prices and the others to follow such prices; (subparagraph (7)) fixing uniform retail prices of gasoline to be charged consumers by retailers; and (subparagraph (8)) maintaining wholesale and retail prices by refusing to sell to distributors or retailers who refused to follow prices fixed by the companies or who refused to agree to sell the products of a single major company on an exclusive dealing basis.

**The Present Case.**

In 1956 petitioners filed in the same court the complaint in the case at bar, and in January, 1957, filed an amended complaint (R. II, 2, 12; Resp.App. 1, 11).

The amended complaint charged generally, in the language of the Sherman Act, that respondents and Olympic conspired to monopolize and restrain trade and commerce in the distribution and sale of gasoline among the several states (par. 20, R. II, 18; Resp.App. 17). The conspiracy was alleged to have commenced in 1948—twelve years after the conspiracy alleged in the Government suit (par. 20, R. II, 18; Resp.App. 17)—and to have been participated in by six of the seven major oil companies who were defendants in the Government's suit and one other oil company—Olympic Refining Company. Neither Shell Oil Company nor the Conservation Committee of California Oil Producers, who were charged to have been parties to the conspiracy

alleged in the Government suit, were alleged to have been parties to this conspiracy.

In specifying the terms of the conspiracy the complaint alleged a conspiracy directed at independent jobbers in the Southern California area (par. 21, R. II, 18-21; Resp.App. 18-20). Specifically it alleged that the conspiracy consisted of an agreement to exclude independent jobbers of gasoline from the distribution thereof; to eliminate the customers of independent jobbers of gasoline; to exclude customers of independent jobbers of gasoline from competing with retail outlets operated by defendants; to obtain monopolistic control over gasoline sold through retail outlets by refusing to sell gasoline to jobbers and (inconsistently) fixing the prices at which gasoline would be sold to jobbers; to obtain noncompetitive profits by eliminating the sale of gasoline through independent jobbers and (inconsistently) fixing the prices at which gasoline would be sold to jobbers; and to exclude petitioners from the business of distributing gasoline in the Southern California area by eliminating their source of supply and (inconsistently) fixing the prices at which gasoline would be sold to petitioners (par. 21, R. II, 18-21; Resp.App. 18-20).

No one of the terms of conspiracy thus alleged was a "matter complained of in [the Government] proceeding," either "in whole or in part."[4] There was no "substantial identity of subject matter"[5]—indeed, no identity at all—between the two complaints.

During the course of pretrial proceedings petitioners filed a memorandum of their contentions and the facts and law

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4. Section 5(b) of the Clayton Act (15 U.S.C.A. sec. 16(b)) provides for the suspending of the running of the statute of limitations on a "private right of action * * * based in whole or in part on any matter complained of in [the Government] proceeding * * * during the pendency thereof * * *."

5. Quoted from the *Nisley* case. See page 9, infra.

upon which it would rely ("Plaintiff's Memorandum of Contentions of Fact and Law" (R. III, 278; Resp.App. 24)). In that memorandum petitioners further narrowed their charges (R. III, 179-280; Resp.App. 25-26):

> "In about the year 1948 'self service' gasoline stations were introduced on a large scale. The gasoline sold at such stations was rebrand gasoline obtained for the most part from jobbers such as plaintiff The Progress Company. In fact, plaintiff The Progress Company was then supplying one such self serve station, the Gilmore Station at 7718 Beverly Boulevard, Los Angeles, California.
>
> "It is contended that defendants herein combined and conspired to meet the threat of such self serve stations and their suppliers, that such combination and conspiracy was illegal under the Sherman and Clayton Acts, and that plaintiffs were damaged as a result of acts done by the defendants herein pursuant to such combination and conspiracy."

The conspiracy thus particularized bears no relation to the conspiracy alleged in the Government's complaint.

In their brief in this Court (pp. 19-21), in support of a contention that their "right of action is based at least in part upon matters complained of in the Government proceedings," petitioners list 18 "contentions" upon which they relied in the court below (Petitioners' Br. p. 21). These "contentions," however, form no part of the conspiracy alleged in the amended complaint or specified in the memorandum of contentions. They are not alleged to be, or contended to be, overt acts taken pursuant to the conspiracy, or to constitute any part of petitioners' "private right of action."[6] They are set out in the memorandum of contentions as items of proof—alleged "uniform business conduct"

6. Clayton Act, section 5(b).

which petitioners stated they would offer as part of their case *to prove* the existence of the combination and conspiracy alleged (R. III, 282; Resp.App. 28).

Petitioners' position in this regard was made clear in its statements to the trial court at the pretrial proceedings (R. XI, 421-422; Resp.App. 79-80):

> "THE COURT: Do you claim that damage to the plaintiff partnership proximately resulted from more than one conspiracy?
>
> "MR. HARRIS: No, sir, we do not.
>
> "THE COURT: What conspiracy are you relying upon?
>
> "MR. HARRIS: We rely upon the 1948 conspiracy, but—
>
> "THE COURT: All right. Then that is the only one relevant here to any claim of damage.
>
> "MR. HARRIS: To claim of damage, yes. But to proof of the conspiracy, no. And that is where I say there is going to be—
>
> "THE COURT: You mean you may offer evidence of other conspiracies to prove the conspiracy relied upon?
>
> "MR. HARRIS: As part of the proof of the 1948 conspiracy, it is our position that we are entitled to offer industry history and background, as well as direct relevance to the issue of the 1948 conspiracy, the fact that at the same time and at times prior the defendants were in conspiracies on these other things, such as crude supply, such as independent refiners—
>
> "THE COURT: I don't suppose there would be any question but what you can offer evidence that shows that they've done similar acts before and have done similar acts since, as far as that is concerned, under the circumstances."

In addition to the foregoing, petitioners, during the further course of pretrial proceedings, stated exactly what they relied upon as their "private right of action." During

those proceedings it appeared that petitioners had had an arrangement with Olympic Refining Company under which they were to be supplied with gasoline as long as Olympic was in turn supplied by respondent General Petroleum Corporation; that respondent Standard Oil Company of California replaced General Petroleum Corporation, as Olympic's supplier in February, 1954, thus terminating petitioners' supply arrangement (R. XI, 412-415; Resp.App. 75-77). In defining their "private right of action" petitioners' counsel stated:

> "• • • If there was a bona fide termination of the supply in 1954 from General to Olympic, we would not be here in court. Because it is our position that if there was no conspiracy, and if this contract in 1954 came to an end of its own volition or, as the defendants here contend, that Olympic simply didn't show up any more • • •[i]f that's what happened, then we'll state right here and now that we don't have a case.
>
> • • • • • • •
>
> "THE COURT: How could there be any damage if General had the right, through whim and caprice, to terminate the supply at any time?
>
> "MR. HARRIS: They had that right, absolutely. If General, acting unilaterally, would have terminated it, we, again, would not be in court. We contend that General, acting unilaterally, did not terminate it; that the defendants combined and conspired to effect that termination.
>
> • • • • • • •
>
> "• • • that [supply of gasoline] was cut off at a time in February of 1954 that we have talked about; and upon being cut off in February, our cause of action at that time arose" (R. XI, 413-415, 429; Resp.App. 75-77, 85).

Thus, the conspiracy alleged by petitioners in their amended complaint, further specified in their Memorandum of Contentions and finally particularized in pretrial pro-

ceedings was a conspiracy between different parties, commenced and related to acts occurring some 12 years after the formation of the conspiracy complained of by the Government, with entirely different terms, different objects and different means to effectuate them.

In this situation, both the district court and the court of appeals held that section 5(b) of the Clayton Act was not applicable. This decision, we submit, fully complies with the tests urged by petitioners in their brief and is clearly correct.

**The Alleged Conflict of Decisions.**

In their brief (page 4) petitioners contend that the court below, in deciding this case, "relied upon and applied the strict construction of Section 5(b) laid down by [the court's prior decision in] *Steiner v. 20th Century Fox Film Corp.* 232 F.2d 190"; that *Steiner* is erroneous and in conflict with *Union Carbide and Carbon Corporation v. Nisley* (1962) 300 F.2d 561, decided by the Tenth Circuit, and *Grengs v. Twentieth Century Fox Film Corporation* (1956) 232 F.2d 325, decided by the Seventh Circuit. In their petition for a writ of certiorari (page 17) petitioners, as ground for the writ, contended that "The Decisions of the Court Below in This Case and in Steiner * * * Are in Conflict With [the above] Decisions of the Seventh and Tenth Circuits."

In 1956, the Court of Appeals for the Ninth Circuit decided *Steiner*. The court construed section 5(b) of the Act as coextensive with section 5(a), stating (232 F.2d 196):

> "A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." * * *
>
> The tolling provision cannot be extended to matters which might have been but were not complained of by

the United States. It is restricted to matters actually complained of. The general rules of collateral estoppel apply. The reasoning of Emich Motors Corp. v. General Motors, 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534, and Partmar Corp. v. Paramount Pictures Theatres Corp., 1954, 347 U.S. 89, 74 S.Ct. 414, 98 L.Ed. 532, is pertinent, although these cases are concerned with the first paragraph of 15 U.S.C.A. § 16."

Thereafter, the Court of Appeals for the Tenth Circuit decided *Nisley*. Disagreeing with the statement in *Steiner*, the court in *Nisley* construed section 5(b) as not subject to the collateral estoppel rules applicable to section 5(a). It held (300 F.2d 569-570):

"The two paragraphs are indeed complementary and should be construed together. * * * But, we do not think they are necessarily co-extensive in their frame of reference. The purpose of the first paragraph of Section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions';

* * * * * * *

"[W]e think Section 5(b), as amended, was intended to suspend the running of the statute on a Section 4 claim during the pendency of a government-instituted suit which complained of all, or a part of the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy.

"These private suits alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied "in part" on the same means for the effectuation of the same conspiracy. There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute."

Following *Nisley*, in 1964, the Court of Appeals for the Ninth Circuit held in *Twentieth Century Fox Film Corporation v. Goldwyn*, 328 F.2d 190, that the statute of limitations was tolled where the private right of action was based in part on the same conspiracy and monopolization which had been complained of by the Government, even though the Government complaint had not claimed that the conspiracy was directed at independent producers of motion pictures, which was the basis of the private right of action. The court held that it was enough that both the Government and the private complaint relied on the vertical integration of Twentieth Century Fox and its subsidiaries as constituting the monopolization and combination complained of in both actions. The court, explaining its prior decision in *Steiner*, said (328 F.2d 219):

> "But, in any event, the tolling statute does not require, and the Steiner test does not provide, that all matters complained of in the private action must find a counterpart in the Government action. The private action is only required to be based in part on a matter complained of in the Government suit. The Goldwyn action is based at least in part on an alleged combination and monopoly between Twentieth Century Fox and National having the objective of monopolizing the business of exhibiting motion pictures, such objective being attained by the acquisition and operation of moving picture theatres."

Referring further to *Steiner*, the court said (328 F.2d 220, n.):

> "Nor, in view of the disposition which we have made of this matter do we find it necessary to pass upon plaintiff's contention that the Steiner case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required."

Thereafter, the case at bar came before the Ninth Circuit. The court recognized that the *Steiner* case seems "to go further than other circuits" (330 F.2d, 301, n. 15). However, it cited and quoted the tests from both *Steiner* and *Nisley,* and held that neither test had been met here (page 301):

> "None of these tests are met * * * there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties."

For the purpose of deciding the instant case, it is immaterial whether *Steiner,* as limited by the Ninth Circuit itself in *Goldwyn,* was correctly decided.[7] We know that the reasoning in *Steiner* was in error in so far as it considered section 5(b) to be limited by the rules of collateral estoppel.

*Minnesota Mining v. N. J. Wood Co.* (1965) 381 U.S. 311.

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7. Actually, *Steiner* as limited by *Goldwyn,* appears to meet the test contended for by petitioners in their brief:

> "* * * the tolling statute does not require, and the Steiner test does not provide, that all matters complained of in the private action must find a counterpart in the Government action. The private action is only required to be based in part on a matter complained of in the Government suit (328 F.2d 219).

*Goldwyn* also removes doubts which at least one commentator expressed concerning *Steiner*:

> "It is clear from the above-quoted passage that the Ninth Circuit, and the courts entering the decisions cited therein, have construed the phrase 'any matter complained of' to mean overt acts of the defendants complained of by the United States in its antitrust proceedings, not just the conspiracy behind the overt acts. This seems a reasonable interpretation of the statute, with which other courts would be likely to agree. However, it is not altogether clear whether *Steiner* holds that a private claim for damages must have in common with a Government proceeding *identical* overt acts on the part of the defendants." (Wiprud, Antitrust Suits—Statute of Limitations, 57 Northwestern U.L. Rev. (1962) 29, 45.)

But in the instant case the Ninth Circuit held that the statute was not tolled under either the *Steiner* or *Nisley* test. And in *Goldwyn* the court suggested that it would reconsider *Steiner* when a case requiring such a determination comes before it.

In these circumstances, and since it clearly appears that the court below did not base its decision upon *Steiner*, but specifically and correctly held that the instant case does not meet the tests of either *Steiner* or *Nisley*, and since petitioners' representation in their petition for a writ of certiorari that the decision in the instant case conflicts with *Nisley* and *Grengs* is mistaken,[8] we submit that this case does not present an appropriate occasion for considering the decision in *Steiner* and that the writ of certiorari should be dismissed as improvidently granted.

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8. In *Grengs v. Twentieth Century Fox Film Corporation* (7 Cir. 1956) 232 F.2d 325, the only issue involving section 5(b) was how long the Government case, conceded to be identical to the private case, had been pending. It is not in conflict with *Steiner*.

## CONCLUSION

For the foregoing reasons we submit that the writ of certiorari herein should be dismissed as improvidently granted or, in the alternative, that the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: September 24, 1965.

Respectfully submitted,

PAUL E. BERMINGHAM,
HOWARD PAINTER,
*Attorneys for General Petroleum Corporation.*

FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,
*Attorneys for Standard Oil Company of California.*

GEORGE W. JANSEN,
*Attorney for Texaco Inc.*

JACK E. WOODS,
WILLIAM D. FOOTE,
CLARK HEGGENESS,
*Attorneys for Richfield Oil Corporation.*

MOSES LASKY,
RICHARD HAAS,
*Attorneys for Union Oil Company of California.*

EDMUND D. BUCKLEY,
WAYNE H. KNIGHT,
*Attorneys for Tidewater Oil Company.*

*Attorneys for Respondents*

# In the Supreme Court of the United States

OCTOBER TERM, 1965

**No. 4**

MARC D. LEH, individually, and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,
*Petitioners,*

vs.

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,
*Respondents.*

## Appendix to Brief for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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## Appendix to Brief for Respondents

*In the District Court of the United States, Southern District of California, Central Division*

Civil Action File No. 20531

Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners,

*Plaintiffs,*

vs.

General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, The Texas Co., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Olympic Refining Company, a corporation, and First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, and Tenth Doe,

*Defendants.*

### COMPLAINT UNDER THE SHERMAN ANTI-TRUST ACT

The above named plaintiffs complain of the above named defendants and each of them, and allege as follows:

## I

## JURISDICTION

(1) The causes of action in this complaint arise under the laws for the protection of trade and commerce against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1, 2 and 7 of the Act of Congress known as the Sherman Act, and Sections 4, 5 and 12 of the Act of Congress known as the Clayton Act (15 U.S.C.A. Sections 1, 2, 15, 16, 22, 26; 26 Stat. 209; 26 Stat. 210; 38 Stat. 731; 38 Stat. 736; 38 Stat. 737).

(2) The purpose of this action is to recover threefold the damages sustained by plaintiffs, plus reasonable attorney's fees and costs of suit caused by the defendants' illegal, monopolistic practices and restraints of trade and commerce, particularly as affecting plaintiffs, all as more fully set forth herein, and for such other and further relief to which plaintiffs may be entitled.

## II

## PLAINTIFFS

(3) The plaintiffs, Marc D. Leh, individually, and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, are residents of the County of Los Angeles, State of California, and since on or about January 28, 1948, until on or about January 8, 1954, were engaged in the business of supplying refined gasoline, as jobbers, to retail gasoline service stations of the so called "Serve-Yourself" type, which service stations were independent of and in competition with the retail gasoline service stations or outlets of the defendants, and said plaintiffs did maintain a principal office for the conduct of said business in the County of Los Angeles, State of California.

III

DEFENDANTS

(4) Defendant, Standard Oil Company of California, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California and transacting business in this judicial district.

(5) Defendant, The Texas Co., is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California and transacting business in this judicial district.

(6) Defendant, Richfield Oil Corporation, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California and transacting business in this judicial district.

(7) Defendant, General Petroleum Corporation, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California and transacting business in this judicial district.

(8) Defendant, Tidewater Oil Company, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California and transacting business in this judicial district.

(9) Defendant, Union Oil Company of California, is now and at all times herein mentioned was a corporation, duly

organized and existing under and by virtue of the laws of the State of California, authorized to do and doing business in the State of California and transacting business in this judicial district.

(10) Defendant, Olympic Refining Company, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of California, authorized to do and doing business in the State of California and transacting business in this judicial district.

(11) Plaintiffs are unaware of the true names and capacities of the defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, and therefore sue said defendants by such fictitious names and will pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendments to this complaint.

(12) Defendants during all the times herein mentioned have been and now are engaged in the producing, refining and marketing of gasoline and other hydro-carbon substances in interstate commerce and each of said defendants conducts a portion of its said business in the County of Los Angeles, State of California, and regularly maintains an office and principal place of business in said County and State.

## IV

## INTERSTATE COMMERCE

(13) Plaintiffs were supplied with refined gasoline by defendants General Petroleum Corporation and Olympic Refining Company. Plaintiffs are informed and believe and upon such information and belief allege that said gasoline, or a substantial portion thereof, was the subject of and was

transported in interstate commerce by defendants General Petroleum Corporation and Olympic Refining Company, said gasoline or a substantial portion thereof being produced or refined outside of the State of California. Said refined gasoline was distributed by plaintiffs, as jobbers, in the State of California and in the State of Arizona and in interstate commerce.

## V

## VIOLATIONS OF LAW

(14) Beginning at an exact date unknown to plaintiffs, but believed to be in the year 1952, and continuously thereafter up to and including the date of the filing of the complaint herein, the defendants' (well knowing all of the facts herein alleged) have conspired to restrain and have restrained trade and commerce in the interstate distribution and sale of refined gasoline by agreeing, combining and conspiring with each other and with other major producers, refiners and distributors of gasoline in restraint of such trade and commerce contrary to Section 1 of the Act of Congress known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A. Section 1) and have thereby substantially lessened, limited and destroyed competition in said trade and commerce and have attempted to force out of the market jobbers of refined gasoline such as the plaintiffs herein and have prevented them from receiving a supply of gasoline with which to compete in said trade and commerce.

(15) Commencing on an exact date unknown to plaintiffs, but believed to be in or about the year 1952, and continuously thereafter, up to and including the date of the filing of the complaint herein, the defendants, well knowing all of the facts herein alleged, have attempted to monopolize and have monopolized, the trade and commerce and inter-

state distribution and sale of refined gasoline contrary to Section 2 of the Act of Congress commonly known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A. Section 2). Said combinations, agreements, conspiracies, monopolizations and attempts to monopolize have, during all of said period of time tended to restrain and monopolize and have in fact, restrained and monopolized trade and commerce in refined gasoline in interstate commerce.

## VI

## OBJECTS AND PURPOSES OF ILLEGAL RESTRAINTS AND MONOPOLIES.

(16) Among the objects and purposes of the illegal restraints and monopolies charged herein were and are the following:

(a) To force out of the market and out of business, jobbers of refined gasoline and to eliminate all or substantially all competition by such jobbers of refined gasoline.

(b) To eliminate the customers of such jobbers of refined gasoline and the competition of such customers with the stations owned and operated by the defendants, many of which customers were in the so called "Serve-Yourself" gasoline retail business in the County of Los Angeles, State of California and elsewhere in the United States.

(c) To exclude the customers of such jobbers from competing with the retail outlets which were owned and operated by the defendants by shutting down and controlling the supply of gasoline to such jobbers.

(d) To obtain practical control and monopoly over the purchase, sale and supply of gasoline in the County of Los Angeles, in the State of California, and elsewhere in the United States.

(e) To obtain prohibitive and non-competitive profits in the retail sale of gasoline in the County of Los Angeles, State of California, and in other States in the United States.

(f) To deprive the public generally of a competitive market in oil and gasoline and of a consequent savings in price and cost to the public.

## VI

## ACTS DONE IN FURTHERANCE OF ILLEGAL RESTRAINTS AND CONSPIRACIES.

(17) In furtherance of said illegal restraints and monopolies and to accomplish the aforesaid objects and purposes of the same, all of the defendants and each of them, have during the times mentioned herein done and caused to be done each of the following acts, among others:

(a) Conspired and agreed among themselves and with each other to restrain interstate trade and commerce in the sale of refined gasoline in the County of Los Angeles and in the State of California, in the State of Arizona, and elsewhere in the United States, and to maintain and perpetuate a monopoly of said trade and commerce in said areas in favor of the defendants named herein.

(b) Conspired and agreed among themselves and with the defendants the General Petroleum Corporation and Olympic Refining Company, to shut off, stop and cease, without provocation, or right, the supply of refined gasoline of the plaintiffs, in order to exclude the plaintiffs from competing in the sale of such refined gasoline.

(c) Pursuant to the conspiracy and agreement alleged in said paragraph (b) above, the defendants the General Petroleum Corporation and Olympic Refining Company did so shut off, stop and cease, without provocation or right, the supply of refined gasoline of the plaintiffs, firstly, on or about September 30, 1952, and finally on January 8, 1954.

(d) Conspired and agreed among themselves to prevent the plaintiffs from obtaining any other source of gasoline, and thereby to prevent the customers of plaintiffs from obtaining gasoline with which to compete with the retail service stations and outlets of defendants.

(e) Pursuant to the conspiracy and agreement alleged in subparagraph (d) above, defendants and each of them, refused to sell and/or deliver gasoline to the plaintiffs at all times after January 8, 1954.

(f) Conspired and agreed among themselves to maintain fixed prices for the sale of refined gasoline in the County of Los Angeles, State of California, based upon the prices set by the defendants, Standard Oil Company of California, and, in furtherance of said conspiracy and agreement, to preclude and destroy any substantial competition including the competition of plaintiffs in the sale of refined gasoline in the County of Los Angeles, State of California.

(g) Pursuant to said conspiracy and agreement alleged in subparagraph (f) above, defendants monopolized the competitive sources of refined gasoline in said area and made it impossible for plaintiffs to obtain refined gasoline in said area.

(h) Pursuant to the conspiracy and agreement alleged in subparagraph (f) above, defendants, Olympic Refining Company, in order to hamper, harass and destroy plaintiffs, brought action number 627406 in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Olympic Refining Company, Plaintiffs, versus A. G. Gilmore Company, a corporation and Marc D. Leh and David E. Brown, partners, doing business under the fictitious name of The Progress Company, a partnership, Defendants, alleging moneys due from plaintiffs to defendant in such suit.

## VII

## EFFECTS OF DEFENDANTS ILLEGAL ACTS UPON PLAINTIFFS BUSINESS.

(18) The unlawful restraints, monopolies, attempts to monopolize, contracts, understandings, combinations and conspiracies of the defendants herein described have been and now have, as intended by the defendants, the following injurious effects upon plaintiffs property and business:

(a) That by reason of the conspiracy and agreement among the defendants and each of them to monopolize the sale of refined gasoline and to force out of business jobbers of such refined gasoline and to force lose and prevent competition therein and by the participation of the defendants General Petroleum Corporation and Olympic Refining Company therein plaintiffs have been deprived of all available source of refined gasoline which would enable them to continue their business and as a result thereof were compelled and forced to cease their business with a consequent loss of actual and potential profits which but for said acts of defendants herein would have resulted in large, substantial and continuing profits to plaintiffs and which to the date of this complaint have caused plaintiffs to lose the profits from their business that they formerly enjoyed.

(b) That by reason of the acts of defendants hereinabove alleged and being deprived of their supply of refined gasoline plaintiffs did and do suffer a loss in their capital investment and their business and in their good will.

(c) That by reason of the acts of defendants as hereinabove alleged and being deprived of their supply of refined gasoline, plaintiffs became and are insolvent and unable to meet the demands of their creditors.

(d) That by reason of the acts of defendants hereinabove alleged and being deprived of their supply of refined gaso-

line plaintiffs were forced out of business but nevertheless had to meet the obligations under the terms of their lease of their principal place of business and the warehouse and to continue to pay substantial rent therefor.

(e) By reason of all the foregoing facts plaintiffs have been damaged in the sum of not less than $245,000.00 to the date of the filing of this complaint.

Wherefore, plaintiffs pray judgment of Court as follows:

(1) That the conspiracy, conspiracies, combinations, contracts and agreements hereinbefore described and the acts taken to effectuate their purpose be declared by this Court to be illegal and in violation of the Sherman Antitrust Act, Sections 1 and 2 (15 U.S.C.A. Secs. 1 and 2).

(2) For judgment against the defendants and each of them in favor of plaintiffs for damages.

(3) For judgment against the defendants and each of them, for costs of suit and reasonable attorneys' fees, pursuant to the laws of the United States as provided in such cases;

(4) For such other and further relief as to the Court shall seem just and equitable.

/s/ Richard G. Harris
Attorney for Plaintiffs

Plaintiffs hereby demand a jury trial of the issues involved in this action.

*In the District Court of the United States Southern District of California, Central Division*

Civil Action File No. 20531—WM

Marc D. Leh, individually and The Progress Company, a copartnership composed of Marc D. Leh and David Brown, co-partners,

*Plaintiffs,*

vs.

General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, The Texas Co., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Olympic Refining Company, a corporation, and First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, and Tenth Doe,

*Defendants.*

## AMENDED COMPLAINT UNDER THE SHERMAN ANTI-TRUST ACT

The above named plaintiffs complain of the above named defendants, and each of them, and allege as follows:

### I.
### JURISDICTION AND VENUE

1. This amended complaint is filed, and these proceedings are instituted under Section 7 of the Act of Congress of July 2, 1890 (26 Stat. 210, as amended; 15 U.S.C.A. Sec-

tion 15), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Anti-Trust Act, and under Sections 4, 5 and 12 of the Act of Congress of October 15, 1914 (26 Stat. 209; 26 Stat. 210; 38 Stat. 731, as amended; 38 Stat. 736; and 38 Stat. 737), commonly known as the Clayton Act, in order to recover damages and injuries to the plaintiffs and their business and property by reason of defendants' violations of Sections 1 and 2 of the Sherman Anti-Trust Act.

2. Each of the corporate defendants herein named has an office, transacts business, and is found within the Central Division of the Southern District of California. The alleged violations of law hereinafter described have been carried out in part within the said Division and District, and the Interstate commerce in petroleum products herein involved, as hereinafter described, is carried on in part within the said Division and District.

## II.

## PLAINTIFFS

3. Plaintiff Marc D. Leh, and David Brown, are each residents of the County of Los Angeles, State of California, and commencing on or about January 28, 1948, were engaged in the business of supplying refined gasoline under the name and style of "The Progress Company"; that said company was a copartnership composed of Marc D. Leh and David Brown; that the distribution of gasoline by such copartnership consisted of the supplying of refined gasoline by The Progress Company as a jobber to retail gasoline service stations; that The Progress Company maintained its principal office for the conduct of said business in the County of Los Angeles, State of California.

## III.

## DEFENDANTS

4. Defendant, Standard Oil Company of California, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California, and transacting business in this judicial district.

5. Defendant, The Texas Co., is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California, and transacting business in this judicial district.

6. Defendant, Richfield Oil Corporation, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California, and transacting business in this judicial district.

7. Defendant, General Petroleum Corporation, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California, and transacting business in this judicial district.

8. Defendant, Tidewater Oil Company, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do and doing business in the State of California, and transacting business in this judicial district.

9. Defendant, Union Oil Company of California, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of California, authorized to do and doing business in the State of California, and transacting business in this judicial district.

10. Defendant, Olympic Refining Company, is now and at all times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of California, authorized to do and doing business in the State of California, and transacting business in this judicial district.

11. Plaintiffs are unaware of the true names and capacities of the defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, and therefore sue said defendants by such fictitious names, and will pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendents to this complaint.

12. Wherever in this complaint it is alleged that a corporate defendant did any act or thing, such allegation shall be deemed to mean that the officers, directors, agents and employees of said corporate defendant did authorize, order, perform or ratify such act or thing on behalf of said corporate defendant, while actively engaged in the management, control and performance of its affairs.

## IV.

## NATURE OF TRADE AND COMMERCE

13. Each of the defendants, during all of the times herein mentioned, is and has been engaged in producing, refining and marketing gasoline and other hydro-carbon

substances in various states of the United States. Each of said defendant corporations enters into "Exchange Agreements", many of which call for exchange, sale or purchase of gasoline from or to states outside of the State of California; each of said corporate defendants carries on its business within the State of California, and sells gasoline within the State of California, and carries on its business selling gasoline in states other than and outside of the State of California. That the business of each of said corporate defendants is integrated, and plaintiffs are informed and believe and on the basis thereof allege that no separate records are kept by any of said corporate defendants for the State of California, nor is there a division of the corporate activities of any of said defendants which is confined to the State of California, but that their operations and sale of gasoline within said State are but segments of their operations as a whole.

14. That said corporate defendants, and each of them, enter into contracts, exchange agreements, and carry on correspondence and business activities with persons and companies located outside of the State of California, concerning and relating to the sale and distribution of gasoline within the State of California, and plaintiffs are informed and believe and on the basis thereof allege that a substantial portion of the gasoline sold and distributed within the State of California by said corporate defendants (and/or the crude petroleum from which said gasoline is refined) comes from states outside of the State of California.

15. That at all times herein mentioned, plaintiffs were and had been supplied with refined gasoline purchased from defendant, General Petroleum Corporation and defendant, Olympic Refining Company. Plaintiffs are informed and believe and on the basis thereof allege that

said gasoline or a portion thereof was transported in interstate commerce by defendant, General Petroleum Corporation, and by defendant, Olympic Refining Company; that said gasoline or a substantial portion thereof was produced or refined outside the State of California.

16. That the gasoline purchased by plaintiffs as jobbers in the State of California was sold and distributed by plaintiffs as jobbers in the State of California and in the State of Arizona.

## V.

## PUBLIC INTEREST INVOLVED

17. That the public interest has been and is adversely affected by the acts and things done by defendants, and each of them, as hereinafter described, in that under our present economy the public is dependent upon ready access to gasoline at free and competitive prices. Traditionally, the orderly marketing of gasoline from gasoline refineries to retail outlets has been handled by "gasoline jobbers". Such jobbers handle gasoline on a wholesale basis; many have maintained bulk plants and all have distributive facilities available, such as trucks and trailers.

Wholesale gasoline jobbers have usually been entirely independent from the gasoline refineries and also independent of any financial interest in retail outlets.

During more recent years, gasoline refineries have themselves undertaken the distribution of gasoline from the refineries to retail outlets. More recently, gasoline refineries have enlarged their financial interests in and have acquired a great number of retail gasoline outlets.

As a result of the aforesaid activities of gasoline refineries, including the corporate defendants herein, the number of independent gasoline jobbers is steadily de-

creasing and the ability of independent retail outlets to purchase gasoline on a free, open and competitive market is diminishing.

18. Defendants are the largest producers of refined gasoline sold to and distributed by independent gasoline jobbers in the Southern California area, and they are the source of all, or substantially all, of the refined gasoline sold to and distributed by independent gasoline jobbers in the Southern California area.

19. Through the practices of defendants and the unlawful interference of defendants, as set forth and as more particularly described hereinafter, plaintiffs were and have been hindered, prevented and impeded in the distribution of gasoline in the Southern California area and to markets located outside of the State of California.

## VI.

## OFFENSES CHARGED

20. Commencing in or about the year 1948, the exact date being to the plaintiffs unknown, and continuing thereafter until the present, the defendants, and each of them, were and have been engaged in an unlawful combination and conspiracy to unreasonably restrain trade and commerce in the interstate distribution and sale of refined gasoline among the several states of the United States, and unreasonably to restrain plaintiffs in their activities and ability to engage in the aforesaid trade and commerce, and said defendants have combined and conspired, as herein set forth, to monopolize, and have attempted to monopolize, and have succeeded in monopolizing such trade and commerce, all in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act (26 Stat. 209; 15 U.S.C.A., Sections 1 and 2).

21. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize such trade and commerce have consisted of a continuing agreement and concert of action among the defendants, the substantial terms, purposes and intent of which have been that defendants:

(a) Agreed to exclude independent jobbers of refined gasoline from the distribution of refined gasoline throughout the Southern California area by:

1. Forcing such independent jobbers out of the market;
2. Eliminating a source of supply of refined gasoline to such independent jobbers;
3. Eliminating all competition by or from such independent jobbers.

(b) Agreed to eliminate the customers of independent jobbers of refined gasoline by:

1. Refusing to sell gasoline to independent jobbers for sale to such customers of such independent jobbers;
2. Refusing to sell gasoline directly to such customers of such independent jobbers;
3. Fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

(c) Agreed to exclude customers of independent jobbers from competing with retail outlets owned and operated by defendants by:

1. Shutting down and controlling the supply of gasoline to independent jobbers;

2. Refusing to sell gasoline directly to the customers of independent jobbers while furnishing gasoline to retail outlets controlled by defendants, which retail outlets were in direct competition with outlets supplied by independent jobbers;
3. Fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

(d) Agreed to obtain monopolistic control over the supply, distribution and sale of gasoline sold through retail outlets in the Southern California area by:

1. Refusing to sell refined gasoline to independent jobbers;
2. Refusing to sell refined gasoline to the customers of independent jobbers;
3. Fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

(e) Agreed to obtain prohibitive and non-competitive profits from the wholesale and retail sale of refined gasoline by defendants in the Southern California area by:

1. Eliminating the sale and distribution of gasoline through independent jobbers and the competition furnished thereby;
2. Controlling the outlets through which retail sales of gasoline are made;
3. Fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

(f) Agreed to deprive the general public of the advantages of a competitive market for the retail purchase of refined gasoline by:

1. Denying the public the benefits of a free, unhampered and competitive distribution program;
2. Depriving the public from consequent price advantages which flow from free, unhampered competitive distribution;
3. Fixing and controlling the supply and price of gasoline flowing to and available for distribution by independent jobbers.

(g) Agreed to prevent and retard the development of wholesale distribution of gasoline throughout the Southern California area by:

1. Controlling the supply of gasoline in the Southern California area;
2. Controlling the retail outlets through which said gasoline is marketed;
3. Fixing and controlling the price at which said gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

(h) Agreed to exclude and prevent plaintiffs from engaging in the business of wholesale distribution of gasoline in the Southern California area by:

1. Forcing plaintiffs out of the market by fixing and controlling the price at which gasoline would be sold, if at all, to plaintiffs;
2. Eliminating the source of supply of refined gasoline to plaintiffs;
3. Eliminating all competition by or from plaintiffs by fixing and controlling the price at which gasoline would be sold, if at all, to plaintiffs.

22. The aforesaid restraints of trade, attempts to monopolize, and monopolization of such trade and commerce, for and on behalf of defendants, have been effectuated by the defendants, and said defendants have accomplished the objects and purposes of their unlawful activities by the following acts:

(a) Controlling the sale and distribution of refined gasoline in the Southern California area;

(b) Denying independent jobbers access to a source of supply of refined gasoline;

(c) Preventing independent jobbers from obtaining refined gasoline from other sources;

(d) Preventing the customers of independent jobbers from obtaining gasoline with which to compete with retail service stations and outlets operated or controlled by defendants;

(e) Maintaining fixed, artificial and non-competitive prices for the wholesale and retail sale of refined gasoline in the Southern California area;

(f) Precluding and destroying any substantial competition afforded defendants in the wholesale and retail selling and marketing of refined gasoline in the Southern California area;

(g) Controlling the sources of refined gasoline in the Southern California area and preventing and precluding independent jobbers from obtaining source and supply.

## VII.

## EFFECTS OF UNLAWFUL ACTS OF DEFENDANTS UPON PLAINTIFFS AND UPON THE OPERATION OF THEIR BUSINESS

23. The unlawful combination and conspiracy in restraint of trade, combination and conspiracy to monopolize,

acts to monopolize, and the monopolization described above, have as continued by the defendants, and each of them, produced the following unlawful consequences and have had the following injurious effects upon plaintiffs and upon the ability of plaintiffs to engage in the wholesale distribution and sale of refined gasoline:

(a) Defendants have unreasonably and unlawfully fixed and controlled, among themselves, the price at which gasoline would be sold, if at all, to plaintiffs; that as a result thereof plaintiffs suffered a loss of profits which they normally would have enjoyed but for the unlawful conduct of defendants as aforesaid.

(b) Defendants have unreasonably deprived plaintiffs of all available source of refined gasoline, which would enable them to continue their business; that as a result thereof plaintiffs were compelled and forced to cease their business activities with a resultant loss of profits which they normally would have enjoyed but for the unlawful conduct of defendants as aforesaid.

(c) Defendants have unreasonably and without provocation or justification shut off and denied plaintiffs a source of gasoline.

(d) Defendants have unreasonably and unlawfully prevented plaintiffs from carrying on their business activities and as a result thereof the business known as "The Progress Company" became insolvent and unable to meet the demands of its creditors.

(e) Defendants have unreasonably and unlawfully interfered with the business activities of plaintiffs and as a result thereof The Progress Company has been forced to cease doing business, but David Brown and plaintiff Marc D. Leh have nevertheless been required to meet their obligations under the terms of the lease

on the place of business of The Frogress Company, and have been forced to pay substantial rent therefor.

(f) Defendants have unreasonably and unlawfully precluded plaintiff, Marc D. Leh, individually, from entering into or carrying on the business of a wholesale distributor of refined gasoline.

24. That by virtue of the unlawful acts of defendants the said plaintiffs have been damaged in the sum of $245,000 to the date of filing this amended complaint, and that said plaintiffs, under the provisions of Section 7 U.S.C.A., Title 15, are entitled to treble damages therefor in the sum of $735,000; that if the unlawful conduct of defendants persists plaintiffs will be further damaged and will ask leave to amend their complaint to show such further damage and detriment suffered by them.

25. That plaintiffs have been compelled to and have employed attorneys to represent them in this action and have necessarily incurred and will incur for the prosecution of this action not only liability for attorneys' fees but other necessary costs and expenses.

Wherefore, plaintiffs pray judgment as follows:

1. That the acts and things done by defendants be declared illegal and in violation of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C.A., Sections 1 and 2).

2. For damages in the sum of $735,000, being threefold the damages sustained by plaintiffs.

3. For costs of suit and for reasonable attorneys' fees, pursuant to the laws of the United States, and for such other and further relief as to the Court shall seem just and equitable in the premises.

/s/ Richard G. Harris
(Richard G. Harris)
Attorney for Plaintiffs

Plaintiffs hereby demand a jury trial of the issues involved in this action.

*United States District Court for the Southern District of California*
*Central Division*

Civil Action File No. 20531-WM

Marc D. Leh, individually and The Progress Company, a copartnership comprised of Marc D. Leh and David Brown, copartners,

*Plaintiffs,*

–vs–

General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, The Texas Company, a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Olympic Refining Company, a corporation,

*Defendants.*

## PLAINTIFFS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW

### INTRODUCTION

The defendants herein, except Olympic Refining Company, are among the principal producers and marketers of gasoline in the Pacific Coast area. They are engaged in all phases of the gasoline business, including the purchase and production of crude oil, the refining of gasoline and other petroleum products and the transportation and marketing of gasoline.

The defendant Standard Oil Company of California sells gasoline at retail through a wholly owned subsidiary, Standard Stations, Inc. This defendant also sells gasoline to service stations which operate as "Chevron" stations. This defendant also operates a "division" known as "Signal Oil Company" and sells its gasoline through stations owned by this division of the company and designated as "Signal" stations.

The defendant General Petroleum Corporation sells gasoline to service stations which operate as "Mobile Gas" stations. The remaining defendants sell gasoline to service stations known respectively as "Texaco", "Richfield", "Union" and "Associated" stations.

Refined products may be handled on a branded or unbranded basis; that is, a supplier may sell the products under his own brand name to the buyer who distributes them under that name, like the service stations just mentioned, or the supplier may sell his products unbranded, in which event the buyer may resell them also on an unbranded basis or may distribute them under his own brand name.

Plaintiff The Progress Company was one of a large class of buyers of unbranded gasoline for resale. In other words, plaintiff was a wholesaler or jobber of rebrand gasoline.

All of the "major" defendants herein (defined to mean defendants herein except Olympic Refining Company) at one time or other sold rebrand gasoline. The gasoline sold was and is equal in quality to that sold by the major defendants to and through their own service stations. However, such gasoline generally sold at retail at prices lower than those charged by the service stations of the major defendants herein.

In about the year 1948 "self service" gasoline stations were introduced on a large scale. The gasoline sold at such

stations was rebrand gasoline obtained for the most part from jobbers such as plaintiff The Progress Company. In fact, plaintiff The Progress Company was then supplying one such self serve station, the Gilmore Station at 7718 Beverly Boulevard, Los Angeles, California.

It is contended that defendants herein combined and conspired to meet the threat of such self serve stations and their suppliers, that such combination and conspiracy was illegal under the Sherman and Clayton Acts, and that plaintiffs were damaged as a result of acts done by the defendants herein pursuant to such combination and conspiracy.

The issues that plaintiff must prove are:

1. The existence of a combination and conspiracy.
2. The illegality of the combination and conspiracy.
3. Whether the combination and conspiracy affects intrastate commerce.
4. Whether the combination and conspiracy caused damage to plaintiffs.
5. The nature and extent of plaintiffs' damage.
6. Attorney's fees and costs.

It should be stated preliminarily that plaintiffs' discovery proceedings are not complete and that interrogatories submitted by plaintiffs and plaintiffs' motion to compel the production of documents under Rule 34 are currently outstanding. This Memorandum of Contentions of Fact and Law is therefore prepared on the basis of facts of which plaintiffs are presently advised. Pre-Trial order Number 6 provides that this Memorandum of Contentions of Fact and Law is "without prejudice to the right of plaintiffs to apply later for leave to suplement or amend said contentions in the light of facts, if any, of which plaintiffs first become advised after September 10, 1959".

## I.

## THE EXISTENCE OF A COMBINATION AND CONSPIRACY

Reference is made to the amended complaint on file herein for a detailed specification of the charges against defendants. For purposes of this memorandum, but without prejudice to assertion of any of the detailed specifications of the amended complaint, it may be said that plaintiffs contend that defendants combined and conspired broadly to:

1. Boycott self serve stations and other price cutters and their suppliers.

2. Discriminate in price against self serve stations and other price cutters and their suppliers.

3. Gain control of the sale of refined gasoline at the wholesale and retail level, including price control.

4. Monopolize and they have monopolized interstate trade in rebrand gasoline.

Plaintiffs of course do not have to show an express agreement to accomplish the objectives. This was recognized in the case of *United States vs. Paramount Pictures,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, as follows:

> "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."

Similarly in the case of *Interstate Circuit vs. United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 the court declared (306 U.S. 227):

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary

consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In *American Tobacco Co. vs. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575, the court declared (328 U.S. 809-810):

"The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words."

In other words, a combination or conspiracy in restraint of trade may be proved wholly by circumstantial evidence. In *Interstate Circuit v. United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610, the court declared (306 U.S. 220):

"As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators."

This is the "conscious parallelism" doctrine which makes uniform business conduct relevant admissible evidence on the issue of the existance of a combination or conspiracy. Plaintiffs will rely upon the following uniform business conduct to prove combination and conspiracy:

[Here follows a statement of the matters summarized in paragraphs numbered 1 to 18 at pages 19-21 of petitioners' brief.]

*In the United States District Court for the Southern District of California, Central Division*

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Civil Action No. 11584—C
United States of America, Plaintiff

vs.

Standard Oil Company of California; Shell Oil Company; The Texas Company; Richfield Oil Corporation; General Petroleum Corporation; Tide Water Associated Oil Company; Union Oil Company of California; and The Conservation Committee of California Oil Producers, Defendants.

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## COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, complains and alleges upon information and belief as follows:

### *I. Jurisdiction and venue*

1. This Complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, against the named defendants herein in order to prevent violations by them, individually, jointly, and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1 and 2).

2. The alleged unlawful acts and violations hereinafter described, including the combination and conspiracy to restrain and the combination and conspiracy to monopolize, and the actual monopolization of the interstate trade and commerce, have been, and are, conceived, carried out, and made effective in part within the Southern District of California, Central Division, and many of the unlawful acts done pursuant thereto have been performed by defendants, or some of them, and their respective representatives within said District and Division. All of the defendants transact business within the Southern District of California, Central Division, and are within the jurisdiction of this Court for the purpose of service. The interstate trade and commerce, as described hereinafter, are carried on in part within said District and Division.

## *II. Definition of terms*

3. As used herein the following terms shall have the following meanings:

a. "Pacific States Area" refers to the area comprising the States of California, Oregon, Washington, Nevada, and Arizona.

b. "Independent" refers to any producer, transporter, refiner, or marketer of crude oil and refined petroleum products other than the defendants named herein, in which the defendants have no financial or stock interest, and which does business in any of the States included within the "Pacific Coast Area."

c. "Producer" means any person, association of persons, or corporation engaged in the business of extracting from the earth crude oil from which petroleum products can be manufactured.

d. "Gathering line" means any pipeline used in the transportation of crude oil from any oil well or wells or lease tanks to temporary storage facilities or to trunk lines.

e. "Trunk line" or "trunk pipeline" means any pipeline used for the transportation of crude oil from temporary storage tanks in oil fields to refineries, or tank farms, or marine terminal facilities.

f. "Transporter" means any person, association of persons, or corporations engaged in the business of transporting crude oil and refined petroleum products by pipeline, tank car, tank truck, tanker, barge, or any other means.

g. "Marine terminal facilities" refers to any equipment used or useful in the loading or unloading of crude oil or refined petroleum products from or into any tanker or barge at any coastal or inland water dock, wharf, lighterage platform, including such docks, wharves, and lighterage platforms and their connecting pipelines and pumps, and any storage facilities used or useful in the storage of crude oil or refined petroleum products at such terminal.

h. "Through-put contract" refers to any agreement, understanding, or arrangement between a defendant major and an independent refiner under the terms of which: (1) any part of the petroleum refining facilities or capacity of said independent refiner is used by or in any way managed, operated, or controlled by a defendant major in such a way as to give the defendant major any interest in the refined petroleum products output of such a refinery; or (2) the refining operations of an independent refiner are curtailed or the independent refinery is shut down in consideration of the sale by the defendant major to the independent refiner of all or a part of the independent refiner's requirements of gasoline or other petroleum products; or (3) any crude oil of an independent refiner is refined by a defendant major

for the account of or in the interest of an independent refiner or marketer of petroleum products or in consideration for which the independent refiner receives gasoline or other petroleum products from the defendant major.

i. "Exchange" means the practice of delivering or receiving crude oil or refined petroleum products at a named delivery or receiving point in return for the delivery or receipt of the approximate quantity of equivalent or like product at a different delivery or receiving point.

j. "Refined petroleum products" means products resulting from the refining of crude oil and which are sold commercially, including gasoline, lubricating oils, light fuel oil, diesel oil, and kerosene.

k. "Wholesale distribution point" means any physical or geographical location from which deliveries of refined petroleum products are made to retail dealers and large consumers.

l. "Bulk plant" means the storage tanks and warehouses to which refined petroleum products are moved from refineries and marine terminals and from which such refined petroleum products are transported for delivery to service stations, retail dealers, and consumers.

m. (Deleted.)

n. "Jobber," "distributor," or "wholesaler" means anyone who sells or carries on hand a stock of gasoline and other refined petroleum products for distribution at tank wagon prices to retail dealers, service stations, and others, for resale or for direct consumption.

o. "Tank wagon prices" means the prices at which gasoline, fuel oils, diesel oil, stove oil, and kerosene are sold and delivered to retail dealers and large consumers by tank wagons or tank trucks from bulk plants, refineries or marine or inland terminals.

p. "Tank car prices" means the prices at which gasoline, fuel oils, diesel oil, stove oil, and kerosene are sold to retail dealers and large consumers in railroad tank cars.

q. (Deleted.)

r. "Service station" means a retail outlet selling gasoline and other refined petroleum products to consumers only.

s. "Company service station" means a service station operated or managed directly by one of the defendants herein.

t. "Post" means the practice by which any of the defendant oil companies makes public, by display or otherwise, the prices such company will pay for crude oil and the prices at which such company will sell its gasoline and other refined petroleum products.

### *III. Description of defendants*

4. The following corporations, which are incorporated in and have principal offices in the States and cities listed below, are hereby made defendants herein:

| Name of corporation | State of incorporation | Principal place of business |
|---|---|---|
| Standard Oil Company of California | Delaware | San Francisco, Calif. |
| Shell Oil Co. | do | New York, N. Y. |
| The Texas Co. | do | Do. |
| Richfield Oil Corporation | do | Los Angeles, Calif. |
| General Petroleum Corp. | do | Do. |
| Tide Water Associated Oil Co. | do | New York, N. Y. |
| Union Oil Company of California | California | Los Angeles, Calif. |

5. Each of the defendant oil companies (referred to hereinafter as "defendant majors") is integrated and each engages in the business of producing and purchasing crude oil, in the transportation of crude oil and refined petroleum products, in the refining of crude oil into refined petroleum products, and in the wholesale and retail sale of refined

petroleum products. Each produces and refines crude oil within the State of California and each sells refined petroleum products in each of the five States comprising the Pacific States Area.

6. The total combined assets of the seven defendant majors is approximately $3,857,000,000. Defendant Standard Oil Company of California (referred to hereinafter as "Standard") had combined assets in excess of $1,074,525,000 as of January 1, 1949. Defendant Shell Oil Company Incorporated (referred to hereinafter as "Shell") had combined assets as of January 1, 1949, of $640,568,000. Defendant The Texas Company (referred to hereinafter as "Texas") had combined assets of $1,277,093,000 as of January 1, 1949. Defendant Richfield Oil Corporation (referred to hereinafter as "Richfield") had combined assets of $146,994,000 as of January 1, 1949. Defendant General Petroleum Corporation (referred to hereinafter as "General") had combined assets of $131,663,000 as of January 1, 1947. Defendant Tide Water Associated Oil Company (hereinafter referred to as "Tide Water") had combined assets of $287,730,000 as of January 1, 1949. Defendant Union Oil Company of California (hereinafter referred to as "Union") had combined assets of $298,415,000 as of January 1, 1949.

7. The Conservation Committee of California Oil Producers, a voluntary unincorporated association organized and doing business under and by virtue of the laws of the State of California, with principal office and place of business in Los Angeles, California is hereby named as a defendant herein. Said Committee of California Oil Producers was organized for the purpose of controlling and regulating the production of crude oil within the State of California. Such function is not carried on under the author-

ity of any State Statute of the State of California or of any Federal Statute.

*IV. Nature of trade and commerce involved*

8. The petroleum industry in the Pacific States Area, comprising the States of California, Oregon, Washington, Nevada, and Arizona, is divided into four branches—production, transportation, refining, and marketing. Each defendant major is integrated in the sense that each engages in all four branches of the industry. Only a relatively few independent oil companies are so integrated. Most of the independent oil companies operate only in one branch of the industry, that is, either in the production, the refining, or the marketing branch.

9. The Pacific States Area is a self-contained, cohesive unit for the production and refining of crude oil and the distribution of gasoline and other petroleum products. Only 2 per cent of the area's crude production is shipped to destinations outside the area, while shipments into the area of outside crude account for less than 1 per cent of the area's total crude demand. Likewise, approximately 98 per cent of the gasoline and other refined petroleum products sold within the area is refined in the area, while approximately 2 per cent is shipped into the area from refineries located elsewhere. Approximately 90 per cent of the gasoline refined within the area is sold within the area, while the remaining 10 per cent is shipped to domestic and foreign destinations located outside the area. There are no pipelines, either crude or product, available for the transportation of crude oil or refined petroleum products between the Pacific States Area and any other area or region.

*A. The production of crude oil*

10. Crude oil is produced from subsurface deposits known as crude oil reserves. These reserves are found in pools consisting of pockets or reservoirs of oil-bearing rock and sands. Oil pools may be at various geological levels, either above or below other pools in separate geological formations, or they may occur on the same lateral plane with other pools. An oil field consists of one or more oil pools located in close proximity to each other. Oil pools frequently are grouped into an oil field, in part on the basis of the historical development of the oil discoveries, and in part in relation to the existing pattern of the available transportation facilities, particularly pipelines, and the location of crude oil storage facilities. The grouping of pools into fields is important primarily in connection with marketing practices which are conducted on a field basis, particularly with respect to the determination of prices.

11. Crude oil or petroleum is recovered from underground deposits by "producers" from lands which they own in fee, from lands leased by them, or from lands in which they hold some other proprietary interest in the crude petroleum deposits which may be located therein. Oil land holdings range in size from large tracts to single small town lots. The private owners of large oil deposits may either produce the oil themselves or lease the lands to others for operation. Most owners of oil deposits lease their land or oil rights to producers on a royalty basis and sell their share of the oil produced thereon to the producer-lessee.

1. The producing areas

12. All of the crude oil produced in the Pacific States Area is taken from fields located within the State of California. There are no commercially operated crude oil

deposits or reserves in the States of Oregon, Washington, Nevada, or Arizona. The State of California has three producing regions, namely, the San Joaquin Valley, the Los Angeles Basin, and the Coastal Region. The San Joaquin Valley area, containing 86 oil fields and presently producing approximately 50 per cent of the State's total production of crude oil, is located in the southern part of the Great Central Valley of California, principally in Kern, Fresno, and Kings Counties. The Los Angeles Basin, containing 44 oil fields and presently producing approximately 35 per cent of the State's total crude oil production, is located within a radius of 30 miles of Los Angeles Harbor in the southern part of Los Angeles County and an adjoining section of Orange County. The Coastal Region, containing 67 oil fields and presently producing approximately 15 per cent of the State's total crude oil production, extends along the Pacific Coast for more than one hundred miles from the northern part of Los Angeles County through Ventura, Santa Barbara, and San Luis Obispo Counties.

13. In these three areas there are approximately 28,000 producing oil wells located in 197 fields and in approximately 400 pools. As of January 1, 1949, the estimated proved crude oil reserves of these three areas totalled 3,763,583,000 barrels, excluding condensate. In 1948, more than 340,000,000 barrels of oil with a market value of approximately $750,000,000 were produced within the three areas, or approximately 17 per cent of the total crude oil produced in the United States.

14. As of January 1948, there were approximately 950 producers of crude oil in the three producing areas in California. Approximately 50 per cent of the crude oil produced in these three areas is produced by the seven defendant

majors, approximately 2 per cent by integrated independents, and approximately 48 per cent by nonintegrated independents engaged only in the production of crude oil. The crude produced by the defendant majors does not enter the crude oil market since they refine it themselves.

2. Crude oil prices

15. Sellers of crude oil are dependent almost completely upon the existence of expensive highly specialized transportation facilities, chiefly gathering lines and trunk pipelines, for the movement of their product from the wells. Likewise, expensive storage facilities are required for the physical handling of the oil. For these reasons the point of delivery of crude oil is usually very close to the point of sale. Since few independent producers own field gathering lines and storage facilities, and since no independent producers and only a few independent refiners own trunk pipelines running from oil field storage tanks to refining centers, the independent producers are required to sell their crude oil in the field largely to defendant oil companies. The defendant majors purchase approximately 90 per cent of the crude oil produced by the nonintegrated independent producers. These purchases, when added to their own production, provide defendant majors for refining purposes with approximately 94 per cent of the total amount of crude oil produced in the Pacific States Area.

16. Prices for crude oil in the Pacific States Area are not determined by the sellers but by the buyers on the basis of "posted" price quotations publicly offered by defendants Standard, Union, Texas, and General. The posting of such prices is notice by the buyer to all producers that the posting companies are willing to buy crude oil at the posted prices. The posted prices are issued in schedules, showing

prices applicable to various fields and to oil of various degrees of gravity. Defendants Shell, Richfield, and Associated do not post prices but purchase crude oil at the prices referenced by and identical to the prices posted by defendants, Standard, Union, Texas, and General.

17. The four posting companies do not post prices for all of the oil fields in the Pacific States Area. In those fields in which no prices are posted the prices paid for crude oil by defendant oil companies are the prices posted by one or more of the four posting defendant majors for a specified field or fields in the same vicinity. Under this pricing practice the posted price of one or more of the four posting defendants is available, either directly or by reference, to all other purchasers of crude oil, including all seven defendant oil companies, for every oil field in the Pacific States Area and for each and every gravity of crude oil produced.

18. Los Angeles Basin is the principal market for gasoline and other refined petroleum products in the Pacific States Area. Since the oil fields which are contiguous to the Los Angeles refineries are not capable of supplying all of the crude oil requirements of the Los Angeles refineries, additional crude oil must be shipped into Los Angeles from the San Joaquin Valley and Coastal Region. The field price of crude oil at any given location within the Pacific States Area is tied to and based upon the price of comparable crude oil at the Los Angeles Harbor in such a way that the field price of crude in any outlying area plus the cost of transportation to Los Angeles Harbor is equal to the price of comparable oil at the Los Angeles Harbor. The price of crude oil in the entire Pacific States Area, therefore, is determined basically at the Los Angeles Harbor. Field prices of crude oil in areas other than the Los Angeles

Harbor area generally are the prices of comparable crude oil at the Los Angeles Harbor less the transportation rate to the Los Angeles Harbor in bulk quantities by the usual method of transportation.

19. Independent refiners of crude oil, when purchasing their supply must pay at least the posted price of the posting defendant majors. In many instances they are required to pay a bonus or "premium" above the posted price in order to secure adequate supplies because of the dominant position of defendant majors, enhanced by defendant majors' control of the transportation and storage facilities available to such purchasers.

20. On August 1, 1946, crude oil prices were released from the restrictions imposed by wartime governmental controls. From that date until December 1947, the defendant majors increased crude oil prices sharply in a series of steps to approximately double the level existing just prior to removal of governmental wartime controls.

3. Private control of production

21. The State of California has no conservation laws relating to the production of crude oil except those relating to the waste of natural gas occurring in the process of producing crude oil, and to the spacing of wells for drilling purposes. The production of crude oil in California, however, is controlled effectively by a private self-constituted organization of producers called "The Conservation Committee of California Oil Producers." This Committee had its inception in 1930 with the formation by California producers of a so-called "Fact Finding Committee," a voluntary unincorporated association formed for the purpose of obtaining and reporting crude oil production statistics for the industry. The activities of this Committee were enlarged

for the purpose of formulating various programs for imposing quotas upon the volume of oil to be produced; originally, in certain fields or local areas, and later, with reference to statewide production. The present Committee was organized in 1936. In effect, its formation constituted merely a reorganization of predecessor organizations.

22. Defendant, The Conservation Committee of California Oil Producers, was not organized pursuant to any statute of the State of California relating to the conservation of oil and gas. It has no authority in law either to establish or to enforce any system, plan, or program to regulate or restrict the amount of crude oil produced or to be produced within the State of California. Nevertheless said defendant has formulated, developed, and enforced upon the industry a private proration system under which the production of crude oil in California is regulated in every detail.

23. Defendant, Conservation Committee of California Oil Producers, has divided the oil pools or fields in the State into 29 districts. These districts are so defined geographically as to include selected groups of oil fields. Each oil producers has one vote in each district in which he is a producer, regardless of the number of fields in which he is operating or the number of wells from which he may be producing. Each district elects a District Committee. The membership of The Conservation Committee of California Oil Producers is composed of the chairman of each District Committee and three or four members elected at large. This Committee, in turn, selects the membership of the operating subcommittees, including the Administrative Committee and Engineering Board. The Committee also appoints a manager and employs a large staff to assist such manager. The Engineering Board determines the total amount of crude to be produced for each month or for each quarter for the

entire State and for each pool within the State. Such quotas are then considered and approved by the Committee. After approval by the Committee, the Manager of the Committee and his professional staff allocate the production quota established for each pool to each well within such pool. Thereafter detailed schedules of such allotments are sent to each producer within each field. Each producer is required to file with the Manager every ten days a report of his daily production from each well produced. The operations of the Committee are financed by the assessment of approximately one-half mill per barrel of oil produced. These financial details are promulgated and handled by the Administrative Committee.

24. The objective of this private proration scheme has been and is to curtail and control production for the purpose of stabilizing prices of both crude oil and refined petroleum products. During periods of over-production the Committee curtails production to avoid the accumulation of excessive inventories which, in turn, would break the stabilized price structure on gasoline and other refined petroleum products.

25. The private proration system in effect in California is dominated and controlled by defendant majors which produce approximately 50 per cent of the crude oil produced within the State. Under the system of voting established for the election of District Committees, as well as the system under which the membership of the Committee is selected, the defendant majors are able to and do place a substantial number of their representatives on such Committees. In addition, since the defendant majors purchase approximately 90 per cent of the crude oil produced by the independents, set the prices to be paid for such crude oil, and control virtually all transportation and storage facili-

ties necessary to move crude oil from the well to refining centers, they are in a position to and do secure the substantial adherence of most independent producers to whatever production curtailment programs the defendant majors agree to establish.

B. *The transportation of crude oil*

1. The available facilities

26. Crude oil is pumped from producing wells and base tanks within oil pools or fields through so-called "gathering" lines into relatively small field storage tanks located nearby. While in these tanks, water, mud, and other impurities are removed. The oil is then transported from these temporary storage facilities through main trunk pipelines to refineries or to marine terminals for further transportation by marine tankers or barges to refineries.

27. Trunk pipelines are the cheapest and the most expedient of all methods of overland transportation of crude oil from the producing fields to the refineries or to marine terminals. Their construction and maintenance require large expenditures of capital and an assured and continuous supply of crude petroleum for economical operation.

28. As of January 1, 1948, there were approximately 2,434 miles of gathering lines in the Pacific States Area of which defendant majors, either directly or through wholly-owned or controlled subsidiaries, owned 1,863 miles, or 77 per cent. As of the same date there were approximately 3,792 miles of trunk pipelines of which defendant majors, either directly or through wholly owned or controlled subsidiaries, owned 3,661 miles, or 97 per cent.

29. Water transportation enjoys a decided cost advantage over pipeline transportation and is used wherever possible for the longer hauls along the Coast. Most of the

crude moved by water transport is moved initially by pipelines to the marine terminals. Water transport facilities are of two types, to wit: tankers and barges. The tankers are ocean-going vessels which are used principally along the Coast. Barges are used both for ocean transport and on inland waterways. As in the case of pipelines, tankers and barges require a large initial investment and an assured and continuous source of crude oil. On January 1, 1948, defendant majors owned 41 tankers with a total capacity in excess of 4,000,000 barrels, and 21 barges with a total capacity of 146,000 barrels. No independent producer or refiner in the Pacific States Area owns or operates any tankers or barges.

30. Since defendant majors own approximately 97 per cent of the trunk pipelines and 100 per cent of the marine transportation facilities used, the independent refiners can secure crude only from sources located in close proximity to their refineries.

31. Trunk pipelines run from each of the three producing areas in the Pacific States Area to refineries or marine terminals. The San Joaquin Valley is almost completely dependent upon pipeline transportation since no form of water transportation is available, and since mountain barriers and the distances to principal markets are so great as to make truck hauls impractical. Only a small proportion of Valley crude is refined in that area. Each defendant major owns one or more trunk pipelines serving some or all of the fields in that area. Defendants Standard, Shell, and Tide Water own and operate lines running from the San Joaquin Valley north to refineries located at or near Richmond, Martinez, and Avon, respectively, in the San Francisco Bay region. Defendant Tide Water operates a line running northwest to a marine terminal at Mon-

terey. Defendants Texas, Union, and Standard operate lines running southwest to marine terminals on Estero Bay and at Port San Luis. Defendant General operates a line running south to refineries located at San Pedro and Wilmington. Defendant Richfield operates a line running to the Los Angeles Harbor area.

32. Only a small amount of crude oil produced in the Coastal Region is refined there. The producing fields are located in close proximity to marine shipping points. Most of the crude moves to the Coast by pipeline or truck and thence by tanker or barge to refineries located in the Los Angeles or San Francisco Bay areas. Defendant Union operates a trunk line running from Santa Maria Valley fields to Port San Luis, and defendant Shell operates a line running from the Ventura fields south to Wilmington and San Pedro in the Los Angeles Harbor area.

33. In the Los Angeles Basin all of the oil pools are located within a radius of thirty miles of the Los Angeles Harbor. There is a heavy concentration of refineries in the area. Many of these refineries are located adjacent to producing oil fields. Oil moves to the refineries through a network of gathering and short trunk lines which crisscross the area. All of defendant majors operate pipelines in this area. The greater part of the total pipeline mileage owned by independents is located in this area. Due to the short hauls involved in this area, considerable quantities of crude are moved by truck.

2. The exchange of crude oil

34. Oil refiners frequently produce or purchase crude oil at considerable distance from their nearest refinery, tank farm, or transportation facility. A company acquiring such oil usually seeks to exchange it with another firm for

oil of equivalent value at a more convenient location. Such exchanges frequently do not involve an exact equivalent grade of oil delivered by each party. Records are kept and balances are settled periodically. Exchange agreements frequently involve the use of the respective pipeline, storage, and other facilities of the contracting parties.

35. Defendant majors follow the practice of entering into such exchange agreements. The practice has developed to such a degree that approximately 60 per cent of the total production of the Pacific States Area is subject to such exchange agreements. Exchanges of the same oil may be effected several times before such oil is delivered to the ultimate refiner.

36. These exchange agreements necessarily affect the crude oil market structure since they frequently determine a producer's access to a market and a refiner's access to a source of crude oil supply.

3. Absence of effective common carrier status for pipelines

37. (Deleted.)

38. (Deleted.)

39. (Deleted.)

C. *The refining of gasoline and other petroleum products*

40. The manufacturing phase of the oil industry involves the refining of crude oil into gasoline and other petroleum products, including lubricating oils, greases, diesel oil, gas oil, fuel oils, kerosene, etc. Gasoline is the most important product of crude oil. It constitutes approximately 40 per cent by volume and 47 per cent by value of the petroleum products resulting from the refining operation.

41. In relation to its quality as a fuel for automotive propulsion gasoline is rated according to an arbitrary

"octane" scale. The octane rating and scale are based upon the physical molecular structure of the gasoline in relation to its detonating qualities. As the octane rating increases on the scale, the more efficient become the detonating or explosive qualities of the gasoline. This octane quality is also used as a basis for distinguishing between grades of gasoline which carry price differentials. Gasoline referred to in the trade as "housebrand" or "regular" has a lower octane rating and is sold at a lower price than so-called "premium" gasoline which has a higher octane rating. Advances of automotive engineering in the production of high speed, high compression internal combustion engines require that refiners market a gasoline of constantly increasing octane or "antiknock" rating in order that automotive engines may operate at the highest efficiency.

1. The types of refining processes

42. There are three principal types of processes employed in the refining of gasoline and other petroleum products from crude oil. The simplest process is known as distillation which requires the use of heat and pressure. "Skimming" and "topping" are partial crude distillation processes by which gasoline is produced without separating fully the other crude oil fractions. Distillation processes produce from crude oil approximately 25 per cent of gasoline yield by volume. The gasoline so produced is of relatively low octane rating or antiknock quality and usually must be blended or mixed with chemicals to meet modern motor fuel standards.

43. A second and more efficient refining process is known as "cracking." This process effects chemical changes in the crude oil which break down and reform constituent hydrocarbons of higher volatility and market value. This is accomplished by reducing the number of carbon atoms in a

molecule. There are several types of cracking processes, including thermal and catalytic cracking and hydrogenation. Thermal cracking achieves the chemical changes through the use of heat and pressure. Catalytic cracking is more complex and requires the use of a catalyst. Hydrogenation involves catalytic cracking in the presence of free hydrogen under very high pressures. Thermal cracking increases both gasoline yield and quality over the distillation process while catalytic cracking achieves still higher yields and better quality. These two processes produce from crude oil between 40 per cent and 45 per cent of gasoline yield by volume.

44. A third type of refining process employs the relatively new polymerization and alkylation methods, both of which produce gasoline of higher octane or antiknock rating than the cracking processes, as well as higher gasoline yields. These auxiliary processes convert into gasoline and other liquids certain volatile hydrocarbons released by one or more of the other basic refining processes.

45. Defendant majors own and operate refineries which produce gasoline and other petroleum products under all three types of refining processes. They produce approximately 91 per cent of the gasoline refined in the Pacific States Area under the various cracking processes which recover a higher percentage of gasoline than the distillation processes. Because of the large amount of capital investment required to construct refineries using the catalytic cracking processes, as well as the necessity for a continuous supply of crude oil to permit efficient operation under those processes, most of the independent refiners use only the distillation and thermal cracking processes which produce a lower percentage as well as a lower grade and quality of gasoline.

2. The number, location, capacity, and ownership of refineries

46. As of January 1, 1949, there were approximately 64 crude oil refineries located in the Pacific States Area. Their combined crude oil input capacity in service was approximately 1,109,000 barrels per day and 76,700 barrels per day capacity was idle. As of that date facilities for an additional capacity of 21,000 barrels per day were under construction.

47. Four of these 64 refineries are small plants specializing in the production of asphalt and related products from low gravity crude oil. All four of these refineries are owned by independents. Their production of gasoline is negligible. All except one of the remaining 60 refineries are located in California. Of these 60 refineries 43 had an input capacity of approximately 1,021,000 barrels per day as of January 1, 1949. The 17 remaining plants, then idle, had a crude oil input capacity of 76,700 barrels per day. The gasoline refining capacity in the Pacific States Area is about one-sixth of the total gasoline refining capacity in the United States.

48. On January 1, 1949, there were 34 gasoline producing refineries located in the Los Angeles area, 4 in the San Francisco Bay area, 12 in the San Joaquin Valley, 9 in the Coastal Region, and 1 in Spokane, Washington. Defendant majors own or control 20 of these 60 refineries divided as follows: Standard 4, Shell 3, Texas 2, Richfield 2, General 4, Tide Water 2, and Union 3.

49. As of January 1, 1949, all 4 refineries in the San Francisco Bay area were operating; 22 of the 34 were operating in the Los Angeles area; 10 of the 12 located in the San Joaquin Valley were operating; 6 of the 9 located in the Coastal Region were operating; and the one at Spokane was operating. The 34 refineries located in the Los Angeles are represented 57 per cent of the total crude oil

operating capacity in the Pacific States Area and 76 per cent of the shutdown capacity. The 4 refineries located in the San Francisco Bay area represented 32 per cent of the total crude operating capacity. The 12 refineries located in the San Joaquin Valley represented 8 per cent of operating and 10 per cent of shut-down capacity, while the 9 refineries located in the Coastal Region represented 2 per cent of operating and 14 per cent of shut-down capacity. The refinery at Spokane represented less than 1 per cent of operating capacity.

50. Defendant majors own and control approximately 85 per cent of the crude oil refining capacity, approximately 90 percent of the gasoline refining capacity, and approximately 91 per cent of the "cracked" gasoline refining capacity in the Pacific States Area. During 1948, the total gasoline produced by refiners in the Pacific States Area was approximately 120,000,000 barrels of which defendant majors produced and sold approximately 108,000,000 barrels or approximately 90 percent.

D. *The marketing of gasoline and other refined petroleum products*

51. Approximately 50 percent of the gasoline and other refined petroleum products manufactured by refineries located within the State of California is sold in that State. The remaining 50 percent is shipped to the States of Oregon, Washington, Nevada, and Arizona, and to other destinations outside the Pacific States Area. Each defendant major ships substantial quantities of gasoline and other petroleum products from its refineries located in the State of California to wholesale and retail outlets within the States of Oregon, Washington, Nevada, and Arizona. In 1947 the wholesale value of all gasoline, excluding taxes,

shipped from refineries in the Pacific States Area totaled approximately $451,000,000, of which $397,000,000, or 88 percent, was automotive gasoline. The retail value of automotive gasoline sales, excluding taxes, in the Pacific States Area for the same year totaled approximately $700,000,000.

1. Wholesale marketing

52. As used herein, sales at wholesale are sales of gasoline, fuel oils, diesel oil, stove oil, and kerosene to retail dealers and certain large consumers, including governmental agencies and utility, industrial, commercial, and agricultural consumers. Deliveries of products sold at wholesale usually are made by "tank wagons" which are large specially designed trucks or truck and trailer combinations. The basic price for such sales at wholesale is generally called a "tank wagon price." Sometimes deliveries of said products, particularly in the case of fuel oils, are made by tank cars, in which event the prices are called "tank car prices."

53. Most of said petroleum products are distributed from refineries to consumers through wholesale bulk plants and retail dealers, although some of said products are distributed directly to retail dealers and to large consumers from refineries and marine and inland terminals.

54. Where a refinery is located near to a market, the said petroleum products are usually transported by tank wagons from the refinery to bulk plants or directly to retail outlets or large consumers. Where the refinery is located at a distance from a market, shipments of said products are usually made by tankers, barges, pipelines, or railroad tank cars to marine or inland terminal facilities or bulk plants for reshipment and distribution to bulk plants or directly to retail dealers or large consumers.

55. Bulk plants are the principal source of supply to retail dealers in gasoline, fuel oil, diesel oil, stove oil, and kerosene. Bulk plants usually are located at centers of population and trade. They take deliveries from refineries or marine or inland terminal facilities, and maintain large storage facilities. They make deliveries to individual retail dealers and to large consumers within a relatively small adjacent geographical area from tank wagons.

56. Defendant majors own or control most of the bulk plants in the Pacific States Area. Many of these bulk plants are owned by defendant majors and operated by their employees. In addition, defendant majors ship their refined petroleum products to independent distributors who either own bulk plant facilities or lease such facilities from one of defendant majors. Some of these independent distributors purchase the refined petroleum products of defendant majors for resale. Others receive the products on consignment from defendant majors and sell them on a commission basis. Each defendant major requires independent distributors who handle its refined petroleum products to deal exclusively in the refined petroleum products of said defendant major and to refrain from dealing in the petroleum products of independent refiners and marketers. Each defendant major also requires the independent distributors handling its refined petroleum products to sell said products to retail dealers and to large consumers at prices fixed by defendant majors, and otherwise to conduct their businesses in the manner desired by defendant majors. Most of the facilities for the marketing of refined petroleum products at wholesale in the Pacific States Area are therefore foreclosed to independent refiners and marketers, and defendant majors utilize their control of said facilities to effectuate their marketing policies and to maintain the prices at wholesale

which they establish in the areas in which these facilities are located.

57. Each bulk plant has a well defined and recognized geographical area in which it makes sales to retail dealers and large consumers, and a bulk plant handling the products of a defendant major is not permitted to make any sales or deliveries outside of that geographical area. Thus, each bulk plant handling the products of a defendant major has a market area in which it is the exclusive distributor at wholesale of the products of said defendant. However, defendant majors usually retain the right to make sales directly to retail dealers and large consumers located within said geographical areas, so that a bulk plant handling the refined petroleum products of a defendant major does not have any certainty that customers in its territory may not be taken over by said defendant major.

58. Defendant majors sufficiently standardize the various grades, qualities, and components of their gasoline so that it is freely interchangeable among themselves on an exchange basis. A substantial volume of the gasoline marketed in the Pacific States Area is exchanged among them. Such exchanges enable each defendant major to acquire gasoline from other defendant majors at points which are closer to certain of its markets than are its own refining facilities. Defendant majors are thus enabled to penetrate distant markets at transportation costs materially less than said costs would be in the absence of such exchanges. Independent refiners or marketers who are unable to make similar exchanges are largely excluded from markets located at a distance from their refineries because of substantially higher transportation costs than those of defendant majors who make such exchanges.

59. Each of the defendant majors posts tank wagon prices for gasoline, fuel oil, diesel oil, stove oil, and kerosene at each wholesale distribution point at which said products are handled.

2. Retail marketing

60. Except on sales to governmental agencies, industrial, commercial, and large agricultural users, gasoline and motor lubricants are marketed at retail primarily through service stations, and secondarily through dispensing facilities installed in connection with the operation of other businesses, such as garages, automotive repair shops, parking lots, hotels, country general stores, and various other types of business establishments. In 1948 there were approximately 34,000 retail gasoline outlets operating in the Pacific States Area. The defendant majors sell their gasoline and other petroleum products through approximately 29,300 of these retail outlets in the Pacific States Area or approximately 86 per cent of the total number of such outlets. Defendant majors' proportion of the total number of retail outlets varies throughout the Pacific Coast Area, but it is highest in outlying cities and towns which are farthest removed from the refining centers where they can and do take full advantage of their cheaper transportation facilities and make full use of the exchange of products among themselves. Except in the Los Angeles area, defendant oil companies enjoy virtually a complete monopoly of the retail distribution of gasoline and other refined petroleum products in the Pacific States Area. The independent refiners are restricted largely to those local markets situated at or near their refineries, which are located principally in and around Los Angeles Harbor.

61. The defendant majors own and operate approximately 1,173 of the 34,000 retail outlets for petroleum products in the Pacific States Area divided as follows: Standard 1,030, Shell 85, Union 52, Tide Water 4, Richfield 1, and General Petroleum 1. Defendant Texas owns no retail outlets. Defendant majors operate these service stations on an exclusive basis, selling in each station only the refined petroleum products of the defendant major which owns and operates that station.

62. Defendant majors have also obtained and exercised effective control over the operations of the additional approximately 28,127 retail outlets which sell their refined petroleum products to consumers. These retail outlets are operated by independent businessmen who purchase refined petroleum products from defendant majors and resell them to consumers. Many of these independent service station operators lease or sublease their service station properties from defendant majors. All of these operators have entered into supply contracts with the defendant majors. By means of various provisions in these leases, subleases, and supply contracts, and by means of a system of policing which subjects the business operations of these independent service station operators to minute inspection and surveillance, the defendant majors completely dominate and control the manner in which these independent businessmen operate their retail outlets. Each of the defendant majors requires the independent operators who sell its refined petroleum products to purchase their requirements exclusively from the respective defendant major, and not to handle or sell the petroleum products of others. Each of the defendant majors controls the price at which these independent operators resell gasoline and other refined petroleum products. Defendant majors control the hours of operation of the

independent operator's business, the number of his employees, the details of his bookkeeping and accounting procedures and records, the construction, arrangement, and maintenance of his service station, the manner in which he displays and advertises his merchandise, the type, quality, and brands of automotive accessories and miscellaneous merchandise which he handles and sells, and all other details of the conduct of his business affairs. Defendant majors thus dominate and control in excess of 86 per cent of the retail gasoline outlets through which refined petroleum products are sold to consumers in the Pacific States Area, foreclose this substantial part of the retail marketing facilities for refined petroleum products to independent refineries and marketers, and effectuate the policies which they desire in the sale of refined petroleum products at retail.

63. Of the total dollar value of defendant majors' refined petroleum products sold through service stations, approximately 90 per cent is represented by gasoline, approximately 8 per cent by lubricating oils and greases, and approximately 2 per cent by light fuel oils.

64. The retail price of gasoline to the consumer is based on the posted tank wagon price plus a markup or margin for the retailer. The markups applicable to the gasolines sold under the brand names of defendant majors have been standardized and are uniform. Whenever said tank wagon price is changed, the retail price is simultaneously changed in the same amount. By identical and simultaneous changes in posted tank wagon prices, the defendant majors determine, fix, and establish and control retail consumer prices on their brands of gasoline. When defendant majors desire a different retail price than that established as aforesaid, they make special deals affecting the markup of selected retailers in certain marketing locations, including rebates, allowances, and rent adjustments.

E. *Control of the industry*

65. The oil industry in the Pacific States Area is controlled and dominated completely by defendant majors. At the production level defendant majors control approximately 94 per cent of the crude oil produced, either through ownership, lease, or purchase of oil producing lands, or through purchase of crude produced by independents. They control both their own volume of production of crude oil as well as the volume of crude oil produced by independents through control of the policies, practices, and operations of The Conservation Committee of California Oil Producers, which in turn, controls the amount of crude oil to be produced by all producing wells in the Area. There are approximately 950 independent producers of crude oil in the Pacific States Area.

66. At the transportation level, defendant majors own and control approximately 97 per cent of all crude oil trunk lines and approximately 77 per cent of all crude oil gathering lines. They also own and control approximately 100 per cent of the tanker and marine barge facilities used in the transportation of crude oil to refining centers, and approximately 90 per cent of the water transportation facilities, including tankers, barges, and marine terminal facilities, used in the transportation and storage of refined petroleum products.

67. At the refining level, the defendant majors own and control approximately 85 per cent of the crude oil refining capacity and approximately 90 per cent of the gasoline refining capacity.

68. At the marketing level, the defendant majors control approximately 86 per cent of the approximately 34,000 existing retail outlets selling refined petroleum products in the Pacific States Area and sell approximately 90 per cent

of all gasoline sold within the Area. Except for the area within a 30-mile radius of the Los Angeles Harbor, defendant majors enjoy a virtual monopoly in the wholesale and retail sale of gasoline and other refined petroleum products manufactured and sold in the Pacific States Area.

## V. *Offenses charged*

69. Beginning in or about the year 1936, and continuing thereafter up to and including the date of the filing of this Complaint, the defendants have been and now are engaged in a combination and conspiracy to restrain unreasonably, and pursuant to said combination and conspiracy have in fact unreasonably restrained the aforesaid trade and commerce, and have combined and conspired to monopolize, and have succeeded in monopolizing such trade and commerce, in the production, transportation, refining, and marketing of crude oil and refined petroleum products in the Pacific States Area, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U.S.C. Secs. 1 and 2), commonly known as the Sherman Act. Defendants threaten to continue such offenses and will continue them unless the relief hereinafter prayed for in this Complaint is granted.

70. The aforesaid combination and conspiracy unreasonably to restrain trade and commerce, the combination and conspiracy to monopolize, and the actual monopolization, have consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been that defendants:

a. Agree to eliminate competition among themselves in the Pacific States Area:

(1) By stabilizing the amount of crude oil to be produced,

(a) Through the organization, in the absence of any statutory authority, of defendant The Conservation Committee of California Oil Producers which establishes monthly and quarterly production quotas for the State of California, for each pool within the State, and for each well within each pool;

(b) Through the domination and control of the policies and practices of the defendant The Conservation Committee of California Oil Producers by the control of its various committees and officers;

(c) Through establishment of production quotas at such levels as will support the prices on crude oil desired by them, as well as the prices desired by them for refined petroleum products;

(2) By fixing and maintaining uniform and non-competitive prices to be paid by them for crude oil purchased from independents,

(a) By causing one or more of them to post, in each oil field, agreed-upon prices for the various grades of crude;

(b) By causing each defendant major to follow the prices posted by the designated defendant major or majors in each of the oil fields in which the defendant majors purchase crude;

(3) By pooling their respective crude oil transportation facilities for the reciprocal use of each of them;

(4) By making reciprocal exchanges of crude oil among themselves so as to permit each of them to acquire crude of any grade and quality in any and all oil fields in the Pacific States Area;

(5) By sharing wholesale and retail markets with each other in the sale of gasoline and other refined petroleum products,

(a) By standardizing the various grades, qualities and structure of gasoline and other refined petroleum products in such manner as to make such products freely interchangeable among themeselves;

(b) By making exchange agreements among themselves which permit each defendant major to penetrate markets not otherwise availab

(c) By selling gasoline and other refined petroleum products at identical prices, thus confining effective competition among themselves to the advertising of brand names and to the offering of free services in their retail outlets;

(6) By fixing and maintaining uniform and noncompetitive prices for the sale of gasoline and other refined petroleum products at wholesale,

(a) By causing one of them to post, at each of its wholesale distribution points, an agreed price for each type and grade of gasoline and other refined petroleum products;

(b) By causing each of the remaining defendant majors to post and charge prices identical to the prices posted by the designated defendant major in the areas in which each sells gasoline and other refined petroleum products;

(7) By fixing and maintaining uniform and noncompetitive resale prices to be charged consumers by retailers handling the gasoline and other refined petroleum products of defendant majors;

(8) By maintaining the wholesale and retail prices agreed upon,

(a) By refusing to sell their gasoline and other refined petroleum products to any wholesale or retail distributor who fails or refuses to follow the prices fixed by them;

(b) By adopting a uniform policy of refusing to sell their gasoline and other refined petroleum products to any wholesale distributor, jobber, or retail dealer who will not agree to sell the products of a single defendant major on a "full-requirements" or "exclusive-dealer" basis, and of refusing to sell to any dealer whose exclusive-dealing and resale-price maintenance contract with any one of the defendant majors has been canceled because of the failure of such dealer to conform to the requirements for exclusive dealing and resale price-maintenance.

b. Agree to utilize their control of the production, transportation, refining, and marketing of crude oil and refined petroleum products to restrict and to eliminate the competition of independent producers, refiners, and marketers in the Pacific States Area:

(1) By limiting the amount of crude oil which independent producers may produce through the private prorate system imposed by defendant majors through The Conservation Committee of California Oil Producers;

(2) By coercing independent producers to adhere to the production quotas established by The Conservation Committee of California Oil Producers,

(a) By refusing to make contracts for the purchase of crude oil from the independent producers except upon condition that the independent producers produce their wells under the prorates established by The Conservation Committee of California Oil Producers;

(b) By refusing to accept crude oil deliveries from independent producers who produce in excess of the quotas fixed by The Conservation Committee of California Oil Producers;

(c) By refusing the independent producers access to defendant majors' pipeline and storage facilities unless the independent producers produce their wells in accordance with the production quotas fixed by The Conservation Committee of California Oil Producers;

(d) By policing the crude oil output of the independent producers for the purpose of assuring themselves that the production quotas allocated to the independent producers by The Conservation Committee of California Oil Producers have been followed;

(3) By discriminating against the vast majority of independent producers, who operate in only one field, by transferring quotas allocated to wells of defendant majors in some fields to wells in other fields, and balancing or offsetting overproduction of quotas by defendant majors in some fields by underproduction of quotas in other fields, thus enabling said defendant majors to overproduce quotas in some fields without overproducing their State-wide quotas.

(4) By refusing the use of their pipeline transportation facilities serving fields distant from refineries, to independent producers and owners of crude oil at said fields, thus requiring said independent producers and owners to sell their crude oil to defendant majors at prices and on terms fixed by said defendants, or to pay transportation costs for said crude oil much higher than the transportation costs of defendant majors for crude oil produced in said fields.

(5) By refusing to make exchanges of crude oil with independent producers and refiners except in instances where such exchanges will enhance market penetration by defendant majors;

(6) By purchasing the capital stock or assets, or both, of independent refiners;

(7) By inducing independent refiners to shut down their productive capacity or to dismantle their refining facilities in return for an agreement to furnish such independent refiners with their full requirements of gasoline and other refined petroleum products;

(8) By acquiring operating and management control of competing independent refineries under various contractual arrangements, including so-called "throughput contracts";

(9) (Deleted.)

(10) By refusing to sell crude oil to independent refiners;

(11) By limiting the supply of crude oil available to independent refiners by restricting the production of crude oil upon which the independent refiners must depend through prorates imposed by The Conservation Committee of California Oil Producers;

(12) By imposing a squeeze upon independent refiners by temporarily raising the price of crude oil while maintaining the existing price of gasoline and other refined petroleum products, thus eliminating the profit margins of the independent refiners;

(13) By refusing to exchange gasoline with independent refiners except in instances where such exchanges will enhance market penetration by defendant majors;

(14) By refusing to independent refiners the use of their pipeline and marine transportation facilities, or by refusing to independent refiners the use of such facilities except upon discriminatory terms and conditions.

(15) By foreclosing independent wholesale and retail markets otherwise available to the independent refiners by requiring independent jobbers, wholesalers, and retailers to handle exclusively the refined petroleum products of defendant majors.

71. During the period of time covered by this Complaint, and for the purpose of forming and effectuating the aforesaid combination and conspiracy to restrain and to monopolize and the actual monopolization of the interstate trade and commerce hereinbefore alleged, the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do.

72. (Stricken.)

73. (Stricken.)

74. The power of the defendant oil companies to control the petroleum industry in the Pacific States Area has increased steadily at all levels of the industry, including the production of crude oil, the transportation of both crude oil and refined petroleum products, the refining of crude oil into gasoline and other petroleum products, and the distribution of gasoline and other petroleum products at both wholesale and retail. Likewise, the power of defendant oil companies to exclude competition at all levels of the industry, including production, transportation, refining, and marketing has increased steadily. Not only do the defendant oil companies possess the power to control and the power to exclude others from the industry but they have demon-

strated an intention to exercise and have in fact exercised such powers to monopolize the petroleum industry in all of its phases in the Pacific States Area and to exclude substantial competition in such area at all levels of the industry, including production, transportation, refining, and marketing. The association of the defendants for the purpose of market control and the elimination of competition has been so closely coordinated with respect to the development of and adherence to policies and practices to achieve these results that these business operations of defendant oil companies are conducted as if said oil companies were a single concern with single management. The defendants' domination and control of the petroleum industry in the Pacific States Area has become so entrenched, and so overwhelmingly and generally accepted, that it has persisted, and will continue to persist and grow independently of particular operating, purchasing, and selling practices, and irrespective of changes therein, and has made and will continue to make it impossible for independents at any and all levels of the petroleum industry to compete effectively with defendant oil companies, or for new capital and new enterprise to enter the petroleum business in any of its branches in the Pacific States Area, unless the relief hereinafter prayed for is granted.

### VI. *Effects of conspiracy*

75. The aforesaid agreements and concerted action by the defendants, pursuant to and in futherance of the combination and conspiracy alleged in this Complaint, have had the effects, as intended by the defendants, of unreasonably restraining, of virtually monopolizing, and of completely controlling the production, transportation, refining, and marketing of crude oil and refined petroleum products in the

Pacific States Area; of eliminating all real competition among themselves at all levels of the oil industry; and of controlling completely the competition of independent producers, refiners, and marketers. The defendant majors' quadruple monopoly of the production, transportation, refining, and marketing of crude oil and refined petroleum products has stabilized completely the entire oil industry in the Pacific States Area and has resulted in the elimination of all price competition in the sale to consumers of gasoline and other refined petroleum products.

## PRAYER

Wherefore, the Plaintiff prays:

1. That pursuant to Section 5 of the Sherman Act, a summons issue to each of the defendants commanding such defendants to appear and answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the aforesaid combination and conspiracy to restrain unreasonably and to monopolize, and the monopolization of trade and commerce in the Pacific States Area in the production, transportation, refining, and marketing of crude oil and refined petroleum products, be adjudged and decreed to be unlawful, and that the practices alleged in this Complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

3. That the Court adjudge and decree that the defendants have combined and conspired to restrain unreasonably, to monopolize, and have actually monopolized the production, transportation, refining, and marketing of crude oil and refined petroleum products in the Pacific States Area in violation of Sections 1 and 2 of the Sherman Act.

4. That each of the defendants and their successors, officers, agents, employees, transferees, and assigns, and all persons acting or claiming to act on behalf of any of said defendants, be perpetually enjoined and restrained from in any way conspiring, contracting, or otherwise acting with others, or singly, to carry out any of the practices alleged in Paragraphs 69 and 70 of this Complaint.

5. That defendant The Conservation Committee of California Oil Producers be forthwith required to terminate its activities and be duly dissolved, and that defendant majors be enjoined from organizing or belonging to any other organization having as its purpose or effect the voluntary or private control of crude oil production in the oil fields, oil pools, and oil wells located or hereafter to be located in the Pacific States Area.

6. That each defendant major be enjoined from posting prices to be paid for crude oil in any field in the Pacific States Area in which said defendant does not actually buy crude oil unless it is making a bona fide offer to buy crude oil; that each defendant major be enjoined from entering into any contract for the purchase of crude oil which specifies that the price to be paid will be a price posted or paid by one or more other specified defendants; and that each defendant major be enjoined from agreeing to follow or adhere to the prices posted or paid by any other defendant major for the purchase of crude oil from any field or pool in the Pacific States Area.

7. That each defendant major be enjoined from discriminating against independent producers or refiners in the making of exchanges of crude oil, by imposing higher charges or more onerous terms on independent producers or refiners who are parties to exchanges than are imposed on defendants, or by giving preferential treatment to an-

other defendant over an independent producer or refiner in the making of exchanges.

8. That each defendant major be enjoined from the execution of any new contract for the purchase of crude oil from any independent producer which extends for a period of more than one year, or from renewing any existing contract for the purchase of crude oil from an independent producer for a period in excess of one year, except upon a satisfactory showing to the Court, with due notice to the Attorney General and an opportunity to be heard thereon, that a purchase contract in excess of one year will not substantially lessen competition or tend to create or continue a monopoly.

9. That all provisions in existing contracts between defendant majors and independent producers which authorize or permit the defendant major to refuse to accept crude oil in excess of any quota or which require the producer to produce no more crude oil than that set forth in a production quota, be declared illegal and void, and that defendants be enjoined from entering into any contract for the purchase of crude oil from any producer containing any provision of this nature.

10. That if any defendant major makes any crude oil trunk pipeline now or hereafter owned or operated by said defendant available for the use of any other defendant, said defendant major shall make said pipeline available for the use of other producers or refiners on equal and nondiscriminatory terms and conditions.

11. That if any defendant major makes available for the use of any other defendant any of its tankers, barges, marine terminals, or facilities, for the storage, transportation, or handling of crude oil or refined petroleum products, said facilities shall be made available to independent producers

or refiners of said products upon equal and nondiscriminatory terms and conditions.

12. That no defendant major be permitted to purchase or acquire the capital stock or assets of any refiner operating in the Pacific States Area except upon a satisfactory showing to the Court, with due notice to the Attorney General and an opportunity to be heard thereon, that such purchase will not substantially lessen competition or tend to create a monopoly in any line of commerce.

13. That each defendant major be enjoined from executing any so-called "through-put" contracts with independent refiners, except upon a satisfactory showing to the Court, with due notice to the Attorney General and an opportunity to be heard thereon, that such contract will not substantially lessen competition or tend to create a monopoly.

14. That each defendant major be enjoined from agreeing to follow or adhere to the prices posted or charged by any other defendant major for the sale of gasoline or other refined petroleum products in the Pacific States Area.

15. That defendant majors be perpetually enjoined and restrained from adopting or following any practice, plan, program, or device which has either the purpose or the effect of stabilizing or fixing noncompetitive prices to be charged by them or by anyone else for the sale and distribution of gasoline and other refined petroleum product in the Pacific States Area, or in any part thereof.

16. That each defendant major be enjoined from discriminating against independent refiners, marketers or distributors in the making of exchanges of gasoline and other refined petroleum products, by imposing higher charges or more onerous terms on independent refiners, marketers or distributors who are parties to exchanges than are imposed

on defendants, or by giving preferential treatment to another defendant over an independent refiner, marketer or distributor in the making of exchanges.

17. That each defendant major and each of its subsidiaries be required to divest itself of all right, title and interest in all service stations or other retail outlets now owned by said defendant or subsidiary; that each of said defendants and its subsidiaries be enjoined from hereafter acquiring any interest in any service station or retail outlet, including the acquisition or renewal of any leasehold interest; that each defendant major and each of its subsidiaries be enjoined from the operation, management or control of any service station and from engaging in the business of selling refined petroleum products at retail either through its own employees or by other persons designated as agents, consignees or managers; that every agreement whereby a defendant major or any of its subsidiaries leases a service station to an operator, and every agreement under which a defendant major or any of its subsidiaries supplies refined petroleum products to a service station operator, shall be in writing and for a term of not less than three years, and that no defendant major or subsidiary may cancel any such lease agreement or supply contract except for a breach of a specified covenant thereof, after written notice specifying the facts constituting said breach.

18. That each defendant major and each of its subsidiaries be enjoined from engaging in the sale and distribution of gasoline or other refined petroleum products at wholesale through agents, commission agents, or consignees, and from renewing or extending any contract or agreement whereby any wholesale distributor or other person is designated or appointed as an agent, commission

agent, or consignee for the sale and distribution of gasoline or other refined petroleum products at wholesale; that each defendant and its subsidiaries be required to convert all existing agency, commission or consignment contracts for the sale and distribution of gasoline or other refined petroleum products at wholesale to contracts whereby said petroleum products are sold to wholesale distributors for resale by them at wholesale; that every agreement whereby a defendant major or any of its subsidiaries leases a bulk plant or facilities for the distribution of gasoline or other refined petroleum products at wholesale to a wholesale distributor, and every agreement whereby a defendant major or any of its subsidiaries supplies gasoline or other refined petroleum products to a wholesale distributor, shall be in writing and for a term of not less than five years; and that no defendant major or any of its subsidiaries may cancel any such agreement except for breach of a specified covenant thereof, after written notice setting forth the facts constituting said breach.

19. That each defendant major and each of its subsidiaries be enjoined from granting to any wholesale distributor of gasoline or other refined petroleum products any exclusive sales territory; or placing any limitations on the territory in which said wholesale distributor may resell any of said products; or from requiring that said wholesale distributor shall resell said products only to purchasers designated or approved by said defendant major or subsidiary, or precluding or preventing sales by said wholesale distributor to designated or specific customers; or from including in any contract with a wholesale distributor any provision whereby said defendant or any of its subsidiaries has an option to purchase or rent, or whereby said wholesale distributor may be required to sell or rent to

said defendant or subsidiary, any of the properties, facilities or equipment of said wholesale distributor for the handling or distribution of gasoline or refined petroleum products, and that any provision of this nature in any existing contract between any defendant major or any of its subsidiaries and any wholesale distributor, including agents, commission agents or consignees, shall be cancelled and declared to be null and void and unenforceable.

20. That defendant majors and each of them and their subsidiaries, and all officers, agents, employees, transferees, or assigns, and all persons acting or claiming to act on behalf of any of said defendants, be enjoined from entering into or using any plan, program, practice, device, contract, agreement, or understanding, including any rebate or other special price concession, which has either as its purpose or effect the establishment, maintenance or control of prices at which gasoline or other refined petroleum products are sold by retail outlets or any other resellers.

21. That each defendant major and its subsidiaries be enjoined from entering into any contract, agreement or understanding with any operator of a service station or other retail outlet for gasoline or other refined petroleum products, or any other reseller of any of said products, which directly or indirectly requires said operator, or other reseller, to obtain all or substantially all of his gasoline or other refined petroleum products from a particular defendant major, or to refrain from handling the gasoline or other refined petroleum products of any other company, or to operate his business during specified hours, or to employ a specified number of employees, or to include specified items or quantities of merchandise in his stock; and that each of said defendants, and subsidiaries, and all officers, agents, employees, transferees, or assigns, and

all persons acting or claiming to act on behalf of any of said defendants, be enjoined from participating in or using any plan, program, practice or device, including contracts, agreements or understandings with operators of service stations or other retail outlets, or other resellers of refined petroleum products, having as its purpose or effect the causing or inducing of said operator or other reseller to deal exclusively in the gasoline or other refined petroleum products of a defendant major through quantity limitations or monetary considerations including but not limited to rebates, bonuses, subsidies, equipment loans, or rental allowances, or reductions in rental charges.

22. That the plaintiff have such other and further relief as the Court may deem just and proper.

23. That the plaintiff recover the costs of this suit.

GEORGE B. HADDOCK,
LAWRENCE W. SOMERVILLE,
WALTER M. LEHMAN,
JOHN H. WATERS,
JOHN M. BODLEY,
*Attorneys, United States Department of Justice.*

HERBERT BROWNELL, JR.,
*Attorney General.*

STANLEY N. BARNES,
*Assistant Attorney General.*

WORTH ROWLEY,
*Attorney, Department of Justice.*

LAUGHLIN E. WATERS,
*United States Attorney.*

*In the United States District Court, Southern District, of California, Central Division*

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Honorable William C. Mathes, Judge Presiding

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No. 20531-SM

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Marc D. Leh, etc., et al.,
*Plaintiffs,*

vs.

General Petroleum Corporation, etc., et al.,
*Defendants.*

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## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, August 21, 1961

[Mr. Harris] • • •

Now, therefore, at this point I think we have an answer to Mr. Painter's assertion that The Progress Company went out of the gasoline business in 1950; and also to point No. 6, that The Progress Company was never forced out of the gasoline business—or, at least, we have this much toward that assertion—that they were in the retail business at least on a 20 per cent participating interest in Gilmore from 1950 to 1952; and from October 16, 1952 forward they had a supply of gasoline of 250,000 gallons a month which was being disposed of, and they were in all senses a sub-distributorship operation of Olympic Refining Company.

The Court: When were they cut off, and how were they cut off?

Mr. Harris: In February 1954, which I will get to subsequently here in my next point, your Honor. I am trying at this point to establish that they were in the gasoline business no later than October 16th of 1952.

Now, the court then asked a question of Mr. Painter—and I have now finished, I believe, with Mr. Painter's discussions of this morning, and we come now to his discussions of this afternoon; his recitation this morning being primarily factual, as I understood, except for the clarifications and additions and filling in that I have done at the present time.

The court asked Mr. Painter the question this afternoon, did the plaintiffs concede that the contract with Progress, or were the arrangements between Progress and Olympic that Olympic would supply so long as they got a supply from General. And the plaintiffs do concede exactly that. That is, that this was the arrangement, that so long as they got a supply from General they would supply Progress, if there was a bonus—

The Court: That is, so long as Olympic received a supply from General Petroleum, Olympic would supply The Progress Company, the partnership?

Mr. Harris: That is right. If there was a bona fide termination of the supply in 1954 from General to Olympic, we would not be here in court. Because it is our position that if there was no conspiracy, and if this contract in 1954 came to an end of its own volition or, as the defendants here contend, that Olympic simply didn't show up any more—and I noticed a certain hurt tone in Mr. Painter's voice like a lover whose sweetheart doesn't call any more, "I was there ready and waiting for him and the light was out and

the door was open and he never came around any more. And I can't understand it, and I am very hurt by it."

If that's what happened, then we'll state right here and now that we don't have a case. But that, plaintiffs submit, is not what happened. The transfer of the account from General to Standard, it's plaintiffs' position, was prearranged, originally discussed between Mr. P. S. Peterson and Mr. Dollar at a meeting at the Bohemian Club in San Francisco; and, contrary to Mr. Painter's assertion at this time that General Petroleum never knew anything about it, it's plaintiffs' contention, and we think we can prove that a gentleman whose presence at the present time is unknown but at the last taking of depositions on this he was somewhere in Arabia working for, I believe, General Petroleum, or perhaps Standard Oil—anyway, he acted as the clearing man for the take-over of this account, and did exactly that. And, furthermore, that the take-over of the account was simply one other act to shift from one supplier to another the distributorship accounts and remove the sub-distributorships along the way.

So that contrary to the defendants' position, or General Petroleum's position that we knew nothing, we don't know what was happening, one day some flunky down on the rack called up—apparently Mr. Minckler got a direct line through and said, "Say, Bob, Olympic isn't down here any more"—which seems rather ridiculous on its face, but their first knowledge of this comes from somebody loading trucks on the rack.

Our position—and, as I say, we think we can prove it—is that this shift was a planned part of getting rid of subdistributorships. And not only that, it was cleared by Standard Oil Company with General Petroleum General Petroleum knew all about it. And it was simply part and

parcel of the conspiracy that we have alleged in our complaint.

The Court: How would there be any damage if General had the right, through whim and caprice, to terminate the supply any time?

Mr. Harris: They had that right, absolutely. If General, acting unilaterally, would have terminated it, we, again, would not be in court. We contend that General, acting unilaterally, did not terminate it; that the defendants combined and conspired to effect that termination.

* * * * * * *

Mr. Harris: Moving now to the next point that Mr. Painter brought up this afternoon, and that was the question of releases, there are two releases to be discussed: One of July 26, 1950, involving General Petroleum Corporation, and the other in 1955 involving Signal Oil & Gas Company.

Now, I'll take the last one first, that is, the Signal Oil & Gas Company first. And I would like also to read to the court the testimony that Mr. Painter read this morning, because, at least to me, it doesn't support his position at all.

The questioning was as follows at pages 896-7 of the Leh deposition.

"Q. By Mr. Painter: And by your statement that it was your opinion that Standard and Signal 'had conspired to prevent our carrying out our OPO contract with F. Supply Company,' you meant that there was a conspiracy between Signal and Standard to prevent you going into the Farm Bureau field?

"A. Yes.

"Mr. Haas: I take it that is Signal Oil & Gas Company?

"The Witness: Yes, Mr. Haas.

"Mr. Mussman: Going back to your question which pertains to that part of the memo where he states that Stand-

ard and Signal had conspired to prevent Olympic Progress Oil Company from carrying out the contract with the Farm Supply Company, my question is this: Is this a different conspiracy than the one that you are alleging in your complaint?

"The Witness: I believe there are several conspiracies. I was referring to Olympic Progress Oil Company, of which I was a part owner, and it has been gone into by a series of questions by Mr. Painter, and it affected me as an individual and affected The Progress Company. So I would say that it was part of the conspiracy, not a different conspiracy."

Now, I quote that because I think that at this point this is another critical issue in the determination of the motions that naturally bring us here, that is, to the discovery motions and the interrogatories.

The defendants in reading their contentions about relevancy of the discovery motions and relevancy of the things we asked for are very express and explicit in stating that we have one small conspiracy here.

In 1948 there was a conspiracy against self-serve stations. This is all. Therefore, we cannot look into any other conspiracies that may have existed, such as with the Conservation Committee to fix the production of crude, or on the Independent Refiners Association. We can't look to those at all because we have a small 1948 conspiracy.

Now, it's our position that the idea of several conspiracies cuts across this whole case. And I earnestly submit to the court that this is something that we're going to have to decide sooner or later in order to pass upon relevancy.

At one point the defendants say we can't get the government work by way of discovery because our conspiracy is 1948 and all of this went on and doesn't have anything to

do with it. But now when it comes up on a question of release, as it does in the OPO situation, they are very apt to say, "Well, this is all one big great happy conspiracy here," and when Leh mentions "conspiracy," even though he talks about several conspiracies, well, he is obviously talking about the big conspiracy going on between us, so this 1955 release releases us all.

The Court: Well, how many do you claim that damage proximately resulted from? More than one?

Mr. Harris: I didn't hear you, your Honor.

The Court: Do you claim that damage to the plaintiff partnership proximately resulted from more than one conspiracy?

Mr. Harris: No, sir, we do not.

The Court: What conspiracy are you relying upon?

Mr. Harris: We rely upon the 1948 conspiracy, but—

The Court: All right. Then that is the only one relevant here to any claim of damage.

Mr. Harris: To claim of damage, yes. But to proof of the conspiracy, no. And that is where I say there is going to be—

The Court: You mean you may offer evidence of other conspiracies to prove the conspiracy relied upon?

Mr. Harris: As part of the proof of the 1948 conspiracy, it is our position that we are entitled to offer industry history and background, as well as direct relevance to the issue of the 1948 conspiracy, the fact that at the same time and at times prior the defendants were in conspiracies on these other things, such as crude supply, such as independent refiners—

The Court: I don't suppose there would be any question but what you can offer evidence that shows that they've done similar acts before and have done similar acts since,

as far as that is concerned, under the circumstances. But what does that have to do with these releases? This release involves only the conspiracy that's relied upon in this case, does it not?

Mr. Harris: No, sir. That's our position. That is what I am trying to get at, and apparently I haven't made that clear to the court.

The Court: You mean it involves other conspiracies besides this?

Mr. Harris: Mr. Leh, in talking about the 1955 situation, is referring to a specific transaction involving Standard Oil Company, an organization known as the California Farm Supply, or Farm Supply Bureau, and Olympic Progress Oil Company.

The Court: Now, which release are you talking about now?

Mr. Harris: I haven't got to the General release.

The Court: The later one.

Mr. Harris: I am talking about the 1955 release at all times until I indicate otherwise to the court.

The Court: But if the release encompasses conspiracies up to date, it would include anything prior to that time, would it not?

Mr. Harris: It would if that was the subject of the release, your Honor.

The Court: Yes.

Mr. Harris: But it is our position that it was not the subject of the release. It is our position that Mr. Leh's testimony here is not at all related to the subject of this action, and the only reason we were going into the OPO-California Farm Bureau transaction, I suppose, is to allow Mr. Painter full and complete discovery. Because it is also our position, and we might as well say it right now,

that Olympic Progress Oil Company has nothing to do with this lawsuit by The Progress Company against these defendants. It's a separate corporate entity.

Mr. Painter wanted to go into the books and records. He wanted to go into testimony on it. We certainly feel that we have afforded him every opportunity for discovery and haven't been at all remiss in letting him look at these things. And I don't think he complained about that to the court.

The Court: Is the partnership a beneficiary of that release?

Mr. Harris: No. The release—

The Court: The release was not given to the partnership.

Mr. Harris: No. The Progress Company—

Mr. Painter: Oh, yes. You are in error. The Signal release inures to the benefit of the individual and the partnership.

Mr. Harris: They are named in it?

Mr. Painter: Oh, yes. And the release moves from them to Signal.

Mr. Harris: I am sorry, your Honor. I understood your question to be was it for the benefit of The Progress Company.

The Court: Well, I meant "benefit" in the sense of obligees. "A party to the release" would probably be more accurate, a more accurate statement.

Mr. Harris: Perhaps it may be appropriate to go into a little bit of the background of the OPO suit.

The Court: Every party named in the release presumably accepts it, I suppose, as something intended for its benefit.

Mr. Harris: The contractual relationship between Signal Oil & Gas Company and Olympic Progress Oil Company was between those two parties only. When the suit was brought, it was brought on the theory of alter ego. Mr. Painter has mentioned that this morning, I believe. And in addition to suing Olympic Progress Oil Company, the additional named defendants were Leh and Brown, and The Progress Company as a named defendant.

Mr. Painter: And Dr. Forbes Farms.

Mr. Harris: And Dr. Forbes Farms is a named defendant in that suit on the theory of alter ego.

So I suppose that in drawing the release these people were put in it since they had been sued. But it is our position, and we very earnestly stated, that The Progress Company had nothing to do with the business of Olympic Progress Oil Company, and the only reason their name appears on that release is because the attorney who prepared the complaint was proceeding, apparently, on an alter ego theory and, therefore, named everybody in sight; and that the release relates to a transaction between Signal and a corporation known as Olympic Progress Oil Company, and does not involve any of the subject matter of this case.

Now, I should also like to point out—I haven't reread the Suckow case. I did when I got the Contentions. But as I recall the Suckow case, it is not the situation that the release in that case was to the defendant. In other words, my recollection of the Suckow case and how it differs from this case is simply that—and I may be wrong in this, but I am almost certain I am correct—that in this case we have a situation where these defendants, who weren't at all parties to that release at all, weren't even named, mentioned, sued, joined, not joined—nothing—are trying to take advantage of a release which was given between other parties.

So to state the facts here, we have a release between Signal and OPO to which Brown, Leh and The Progress Company were also signatories on the alter ego theory.

The Court: They were parties to the release.

Mr. Harris. They were parties to the release, that's right.

These defendants, who were not a party to the release, are now claiming advantage of it.

In the Suckow case, as I recall it, there was a release given to the same people who were made defendants in the later suit, and they came in and said, "You can't sue us. Here is the release that you signed earlier."

So that would be analagous to us now suing Signal Oil & Gas Company, and Signal Oil & Gas Company coming in and saying, "You can't sue us. You have given us a release." They might have more standing to claim the Suckow case than these defendants here. But even the Signal Oil & Gas Company—I don't know about this, but it seems to me that the OPO transaction is completely disassociated from the subject matter of this lawsuit.

The Court: Is the Signal Oil & Gas a co-conspirator here?

Mr. Harris: No, sir. They are not named as a co-conspirator.

The Court: The plaintiffs do not contend that Signal was a party to the conspiracy that is involved here?

Mr. Harris: We contend that we have named the defendants who are parties to the conspiracy, and they are presently before the court.

The Court: They were members of the conspiracy, I I suppose. I don't know. What would be the situation if you release one conspirator?

Mr. Harris: You mean assuming that they were?

The Court: That would be analogous to releasing one tort feasor?

Mr. Harris: Assuming that they were unknown members, to us, of the conspiracy we now talk about, and we release them?

The Court: No, I don't suppose that knowledge and intention would be controlling. If you release one tort feasor, you release all, without knowing that there were others, don't you?

Mr. Harris: I believe that is the general release principle that the defendants are trying to take advantage of. And I don't have any quarrel with that as a general statement of the law.

The Court: You are coming to this other release now?

Mr. Harris: July 1950.

The Court: The earlier release?

Mr. Harris: Yes.

The Court: And that was for the benefit of whom? Who were parties to that?

Mr. Harris: That was directly for the benefit of one of the persons here. That is General Petroleum. So there the proposition, as the court has mentioned it, would hold sway, I suppose.

The Court: I am not suggesting that as any final ruling. I am just raising questions.

Mr. Harris: And I am trying to answer them in the same spirit, your Honor. That is, I am trying to give you my thoughts as I have them on these questions.

The 1950 release, I don't believe, causes any difficulty at all because of the fact that even though it may have released, in the traditional language, all claims from the beginning of the world to the date hereof, it's our position that our

supply of gasoline, at least as a wholesale jobber, came into existence in October of 1952, two years after the release; and that that was cut off at a time in February of 1954 that we have talked about; and upon being cut off in February, our cause of action at that time arose.

The Court: In other words, the claim that is involved here didn't even exist at the time at the time of that release.

* * * * * * *

# In the Supreme Court of the United States

OCTOBER TERM, 1965

**No. 4**

MARC D. LEH, etc., et al.,
*Petitioners,*

vs.

GENERAL PETROLEUM CORPORATION, a corporation, et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Petition for Rehearing

PAUL E. BERMINGHAM,
150 East 42nd St., New York 17, N.Y.

HOWARD PAINTER,
811 West Seventh St., Los Angeles, Calif.

*Attorneys for General Petroleum Corporation.*

FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,
225 Bush St., San Francisco 4, Calif.

*Attorneys for Standard Oil Company of California.*

GEORGE W. JANSEN,
110 Laurel Street, San Diego, Calif.

*Attorney for Texaco Inc.*

JACK E. WOODS,
WILLIAM D. FOOTE,
555 South Flower St., Los Angeles, Calif.

CLARK HEGGENESS,
120 Linden Ave., Long Beach, Calif.

*Attorneys for Richfield Oil Corporation.*

MOSES LASKY,
RICHARD HAAS,
111 Sutter St., San Francisco 4, Calif.

*Attorneys for Union Oil Company of California.*

EDMUND D. BUCKLEY,
4201 Wilshire Blvd., Los Angeles, Calif.

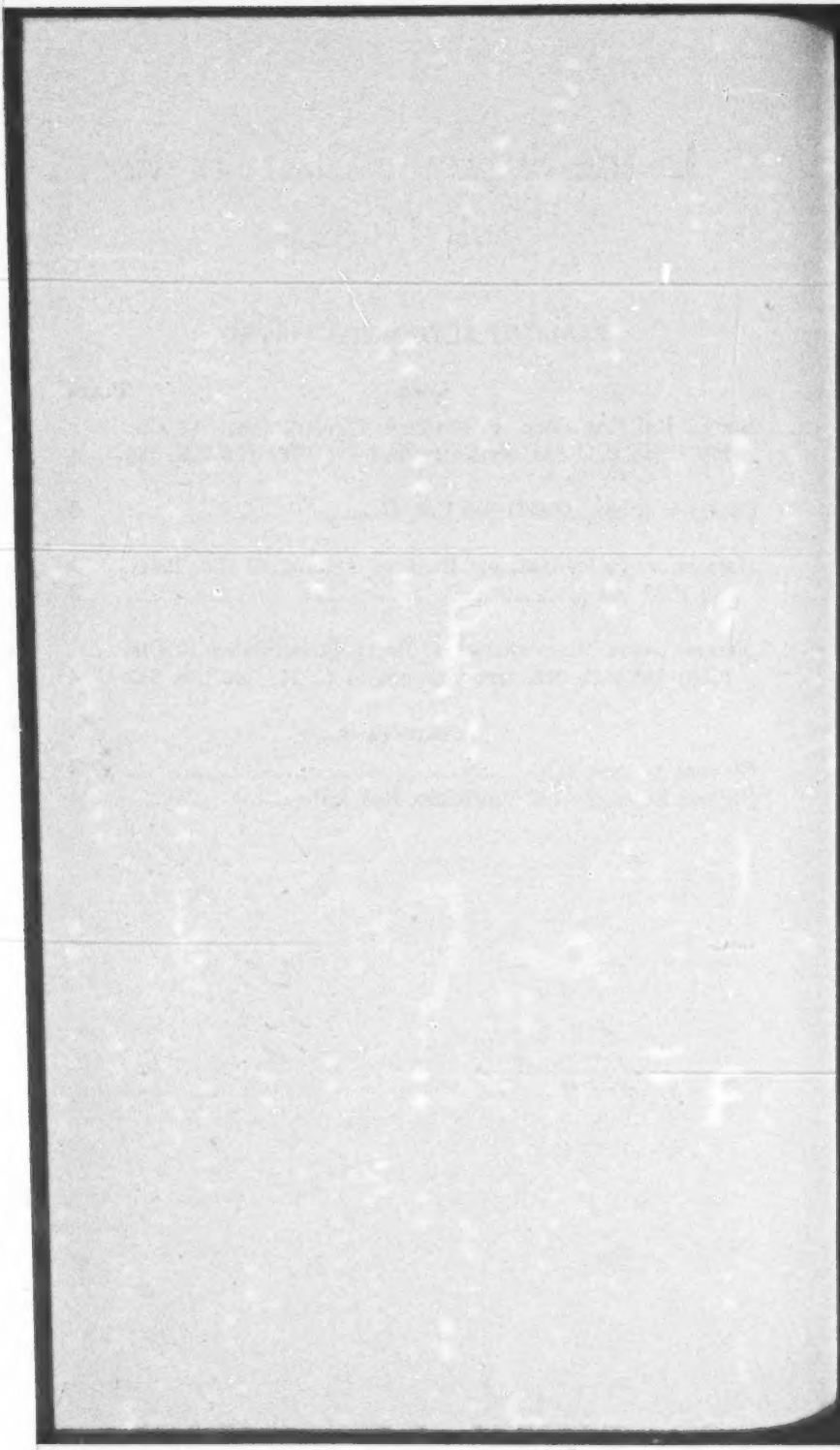
WAYNE H. KNIGHT,
550 South Flower St., Los Angeles, Calif.

*Attorneys for Tidewater Oil Company.*

*Attorneys for Respondents*

BORG PRINTING COMPANY OF CALIFORNIA, 246 FIRST STREET, SAN FRANCISCO 94105

## TABLE OF AUTHORITIES CITED



# In the Supreme Court of the United States

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**No. 4**

MARC D. LEH, etc., et al.,
*Petitioners,*

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GENERAL PETROLEUM CORPORATION, a corporation, et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Petition for Rehearing

Respondents respectfully petition for a rehearing pursuant to Rule 58, on the following grounds:

The Court's opinion states (Slip Op. p. 5):

> "Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief."

However, the Court later in its opinion states (Slip Op. p. 12):

> "In general, consideration of the applicability of § 5 (b) must be limited to a comparison of the two complaints on their face. Obviously suspension of the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of its complaint. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316. *Equally, the availability of §5 (b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits*" (emphasis added).

This petition is addressed to the underscored sentence in the Court's opinion last quoted. We respectfully submit that this statement may have far-reaching implications not supported by any purpose of Congress and not intended by the Court.

We do not question that one does not go behind the allegations of the Government's complaint. But we ask reconsideration of the holding that one must not "equally" go behind the allegations of the later private plaintiff's complaint.

The statutory language (Clayton Act, sec. 5(b)) is that:

> "* * * every private right of action arising under said [the antitrust] laws and based in whole or in part on any matter complained of in said proceeding [by the United States] shall be suspended * * *."

As the Court's opinion observes, the application of section 5(b) requires a comparison. On the one hand, the object of comparison is the "matter complained of" by the Government. The reference here can only be to the Government's complaint. The statute's language plainly so says and one can appreciate Congress's purpose to permit the private

litigant to rely on what the Government asserts without regard to the subsequent disposition of the Government's case.

But the object of comparison on the other hand is the *right of action* on which the private plaintiff would recover but for the statutory bar.

What a private plaintiff may in good faith allege in his complaint is frequently quite different from what he may ultimately prove, even in cases where his proof is sufficient to sustain recovery but for the statutory bar. The Court's language to which this petition is addressed permits, and perhaps even compels, the conclusion that the tolling of the statute hinges on what the pleader has alleged—provided he has acted in good faith—rather than on the reality of his case at the time of proof. Such a rule makes the allegations of the private treble-damage complaint nontraversable for purposes of limitations.

The seriousness of this implication becomes clear when it is recalled that under *Conley v. Gibson* (1957) 355 U.S. 41, the Federal Rules of Civil Procedure permit "notice pleading," whereby the briefest statement in the complaint is sufficient in view of "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of [the] * * * claim * * *" (355 U.S. 47-48). Indeed, in *Harman v. Valley National Bank of Arizona* (9 Cir. 1964) 339 F.2d 564, the Court of Appeals for the Ninth Circuit has held that even where a complaint failed to state "a triable claim," dismissal of the action, after a plaintiff declined to amend the complaint, was error. The Court reasoned that "it cannot be said with certainty from the face of the present complaint that appellant will be unable to allege a triable claim"

(339 F.2d 567), and it pointed to the availability of pretrial conference, discovery procedures and motions for a more definite statement. In view of this liberal rule of pleading, a holding that, absent sham, the face of the private treble damage complaint is determinative for the application of section 5(b) could in effect wipe out the statute of limitations.

We know of no other field of law where the bar of the statute rests entirely on the face of the complaint. Everywhere else, if the complaint is not barred on its face, the defense of the statute may be raised by answer and applied according to the proof. In a proper case the bar may be applied by a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" relating to limitations (Rule 56(c), Federal Rules of Civil Procedure; see, e.g., *Suckow Borax Mines Consol. v. Borax Consolidated* (9 Cir. 1950) 185 F.2d 196, certiorari denied (1951) 340 U.S. 943). Where disposition by summary judgment is not warranted, the bar can yet be applied after plenary trial (e.g., *Bertha Building Corp. v. National Theatres Corp.* (2 Cir. 1957) 248 F.2d 833, 835-836, certiorari denied (1958) 356 U.S. 936).

We respectfully submit that no different rule should be created with respect to section 5(b) of the Clayton Act. Accordingly, we urge the Court, if it adheres to its disposition of this case, to modify its opinion to make clear that even where a complaint in good faith is sufficient to invoke on its face the tolling provision of section 5(b), subsequent developments during pretrial or in the course of trial may show that the "private right of action" is not based, in whole or in part, on any matter complained of

in the Government's complaint, and that the bar of the statute of limitations may then be properly invoked.

Dated: September 30, 1965.

Respectfully submitted,

PAUL E. BERMINGHAM,
HOWARD PAINTER,
*Attorneys for General Petroleum Corporation.*

FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,
*Attorneys for Standard Oil Company of California.*

GEORGE W. JANSEN,
*Attorney for Texaco Inc.*

JACK E. WOODS,
WILLIAM D. FOOTE,
CLARK HEGGENESS,
*Attorneys for Richfield Oil Corporation.*

MOSES LASKY,
RICHARD HAAS,
*Attorneys for Union Oil Company of California.*

EDMUND D. BUCKLEY,
WAYNE H. KNIGHT,
*Attorneys for Tidewater Oil Company.*

By FRANCIS R. KIRKHAM,
*Attorneys for Respondents*

I certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

FRANCIS R. KIRKHAM

# SUPREME COURT OF THE UNITED STATES

No. 4.—October Term, 1965.

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| Marc D. Leh, etc., et al., Petitioners, v. General Petroleum Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. |

[November 8, 1965.]

Mr. Justice White delivered the opinion of the Court.

On September 28, 1956, petitioners, a partnership engaged in wholesale distribution of refined petroleum products and one of the partners, filed in the Southern District of California a treble damage action charging violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2 (1964 ed.), against seven companies engaged in producing, refining, and marketing gasoline and other hydro-carbon substances in interstate commerce. Defendants contended that the action was barred by the California one-year statute of limitations applicable to suits for statutory penalties or forfeitures, Cal. Code Civ. Proc. § 340 (1). Plaintiffs conceded that their cause of action accrued no later than February 1954, and that the four-year limitation provision added to the Clayton Act in 1955, Clayton Act § 4B, 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.), was not applicable to a right of action accruing in 1954. But plaintiffs contended that the governing provision was the California three-year statute of limitations respecting actions on a statutory liability other than a penalty, Cal. Code Civ. Proc. § 338 (1), and that in any event the running of the statute of limitations was tolled by § 5 (b) of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 16 (b) (1964 ed.), because of a civil antitrust proceed-

ing that was commenced by the United States in 1950 and was still pending when plaintiffs filed their complaint. Section 5 (b) provides that during the pendency of a civil or criminal proceeding instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations shall be suspended in respect of every private right of action "based in whole or in part on any matter complained of in such proceeding."[1] The lower courts upheld the defense of limitations and dismissed the complaint, holding that the one-year statute governed and that plaintiffs were not entitled to the benefit of § 5 (b). 208 F. Supp. 289 (D. C. S. D. Cal. 1962), aff'd, 330 F. 2d 288 (C. A. 9th Cir. 1964). We granted certiorari limited to the question of the applicability of § 5 (b), 379 U. S. 877, because of an apparent conflict between this case and *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (C. A. 10th Cir. 1962), cert. dismissed under Rule 60, 371 U. S. 801, concerning interpretation of the statutory requirement that the private action for which the benefit of the tolling provision is sought be "based in whole or in part on any matter complained of" in the govern-

[1] Section 5 (b), 38 Stat. 731, as amended, 15 U. S. C. § 16 (b) (1964 ed.), provides:

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

ment proceeding. We conclude that the lower courts misapplied § 5 (b), and we reverse the judgment below.

Prior to the present case, the Court of Appeals for the Ninth Circuit had declared a restrictive interpretation of § 5 (b). In *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (C. A. 9th Cir. 1956), that court ruled that the scope of § 5 (b) was determined by the principles of collateral estoppel applicable under § 5 (a) of the Clayton Act, 69 Stat. 283, as amended, 15 U. S. C. §16 (a) (1964 ed.), which provides that a final judgment or decree rendered in a suit by the United States and holding a defendant in violation of the antitrust laws shall be prima facie evidence in a private antitrust action against such defendant "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."[2] Accordingly, the Court declared in *Steiner* that "[a] greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d, at 196. In the present case the Court of Appeals

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[2] Section 5 (a), 38 Stat. 731, as amended, 15 U. S. C. § 16 (a) (1964 ed.), provides:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

See generally *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558.

purported to follow *Steiner* and concluded that the running of the statute of limitations was not suspended because here, in the court's opinion, "there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties." 330 F. 2d, at 301; see also 208 F. Supp., at 294–295. Conflicting with *Steiner* and the present case is *Union Carbide & Carbon Corp.* v. *Nisley, supra*, which held that the evidentiary rules of estoppel are not determinative and that the running of the period of limitations is tolled by § 5 (b) if there is "substantial identity of subject matter." 300 F. 2d, at 570.

*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, which was decided in the interim between the granting of certiorari and oral argument in the present case, establishes certain basic principles for the construction of § 5 (b) that are to be followed here. The questions presented for decision in *Minnesota Mining* were whether proceedings by the Federal Trade Commission under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18 (1964 ed.), activate § 5 (b) to the same extent as judicial proceedings and, if so, whether the claim of New Jersey Wood, the private plaintiff, was based on "any matter complained of" in the Commission action. One of the arguments advanced with respect to the first question was that Commission proceedings did not suspend the running of limitations because, it was asserted, any Commission order that might issue would not be admissible under § 5 (a). We rejected this contention that § 5 (a) and § 5 (b) were coextensive.

> "It may be . . . that when it was enacted the tolling provision was a logical backstop for the prima facie evidence clause of § 5 (a). But even though § 5 (b) complements § 5 (a) in this respect by permitting a litigant to await the outcome of govern-

ment proceedings and use any judgment or decree rendered therein . . . it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of § 5 (b) indicates that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. . . . Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties." 381 U. S., at 319.

*Minnesota Mining* sweeps away much of the foundation for the *Steiner* view of the scope of § 5 (b). The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants. Rather, effect must be given to the broad terms of the statute itself—"based *in whole or in part* on *any matter* complained of" (emphasis added)—read in light of Congress' "belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." 381 U. S., at 318. Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of § 5 (b) be made in good faith to lead them into a nig-

gardly construction of the statutory language here in question. With those matters in mind we now turn to a comparison of plaintiffs' complaint with the complaint in the government proceeding on which plaintiffs rely, *United States* v. *Standard Oil Co. of California*, Civil No. 11584–C, D. C. S. D. Cal.[3]

The complaint of the United States charged that seven petroleum companies and the Conservation Committee of California Oil Producers had conspired together to restrain and to monopolize interstate commerce in the Pacific States area in violation of §§ 1 and 2 of the Sherman Act, beginning in or about the year 1936, and continuing up to and including the date suit was filed in 1950. The complaint divided the conspiracy into two principal branches: (1) agreement by the defendants to eliminate competition among themselves in the Pacific States area and (2) agreement by the defendants to utilize their control of the production, transportation, refining, and marketing of crude oil and refined petroleum products to restrict and to eliminate the competition of independent producers, refiners and marketers in the Pacific States area. In furtherance of the first branch of the conspiracy, the complaint further charged, defendants had conspired to do and had actually accomplished the following things, among others: sharing wholesale and retail markets with each other by selling gasoline and other refined petroleum products at identical prices, thus confining effective competition among themselves to the advertising of brand names and to the offering of free services in their retail outlets; fixing and maintaining uniform and noncompetitive prices for the

[3] The case has since been terminated by consent judgments entered into by all defendants except the Conservation Committee of California Oil Producers and Texaco, Inc., which were dismissed. See 1958 CCH Trade Cases, ¶ 69,212; 1959 CCH Trade Cases, ¶ 69,240; 1959 CCH Trade Cases, ¶ 69,399.

sale of gasoline and other refined petroleum products at wholesale and at retail; refusing to sell their petroleum products to any wholesale or retail distributor who failed or refused to follow the prices fixed by them; and refusing to sell their petroleum products to any wholesale distributor, jobber, or retail dealer except on a "full-requirements" or "exclusive-dealer" basis. Among acts and agreements charged as having been accomplished in furtherance of the second branch of the conspiracy were the following: coercing independent producers into limiting production of crude oil through production quotas established by the defendant Conservation Committee; limiting the supply of crude oil available to independent refiners and refusing to sell crude oil to such refiners; acquiring control of independent refiners; inducing independent refiners to shut down their productive capacity or to dismantle their refining facilities in return for an agreement to furnish such independent refiners with their full requirements of gasoline and other refined petroleum products; foreclosing independent wholesale and retail markets otherwise available to the independent refiners by requiring independent jobbers, wholesalers, and retailers to handle exclusively the refined petroleum products of defendants.

Plaintiffs' amended complaint in the present case also charged a conspiracy to violate §§ 1 and 2 of the Sherman Act. The period of the conspiracy of which plaintiffs complained varied somewhat from that charged in the government action, plaintiffs alleging that the conspiracy herein commenced in or about the year 1948 (the year in which plaintiffs commenced business) and continued until the date of the filing of the complaint in 1954. The defendants were the same as those in the government proceeding, except that Shell Oil Company and the Conservation Committee of California Oil Producers were named as defendants in the government suit and were not

defendants here and Olympic Oil Company was named as a defendant here and was not a defendant in the government proceeding.[4] The complaint charged that defendants had agreed to restrain and to monopolize the wholesale and retail distribution of refined gasoline throughout the southern California area by excluding independent jobbers from such distribution and by eliminating the jobbers' customers, *i. e.*, retail outlets, and preventing those customers from competing with retail outlets owned and operated by defendants. In particular, defendants were alleged to have accomplished their unlawful purposes by the following acts: controlling the sale and distribution of refined gasoline in the southern California area; denying independent jobbers access to a source of supply of refined gasoline; preventing independent jobbers from obtaining refined gasoline from other sources; preventing the customers of independent jobbers from obtaining gasoline with which to compete with retail service stations and outlets operated or controlled by defendants; maintaining fixed, artificial, and noncompetitive prices for the wholesale and retail sale of refined gasoline in the southern California area and fixing the price at which gasoline would be sold, if at all, to independent dealers and jobbers; and generally controlling the sources of refined gasoline in the southern California area and preventing and precluding independent jobbers from obtaining a source of supply. Plaintiffs claimed injury to their independent jobber business through a loss of profits resulting from price-fixing and from the destruction of their business because of the termination of their source of supply.

The lower courts found that plaintiffs' complaint was not based in whole or in part on any matter complained

[4] Olympic was dismissed from the case prior to the ruling on defendants' statute of limitations defense.

of in the government proceeding principally because of the differences in the defendants named in the two suits and in the period of the conspiracies alleged. See 330 F. 2d, at 301; 208 F. Supp., at 294–295. We cannot agree that these differences bar resort to the tolling provision in this case.

Here too we may find guidance in *Minnesota Mining*. In that case, the plaintiff, a manufacturer of electrical insulation materials, brought suit against Minnesota Mining and Manufacturing Company and the Essex Wire Corporation, the complaint alleging violations of § 7 of the Clayton Act and §§ 1 and 2 of the Sherman Act. The substance of the complaint concerned the acquisition by Minnesota Mining from Essex of Insulation and Wires, Inc., which thereafter ceased to distribute plaintiff's products, and an alleged conspiracy between Minnesota Mining and Essex to restrain trade in electrical insulation products. The action upon which plaintiff relied as suspending the running of limitations was a Federal Trade Commission proceeding under § 7 against Minnesota Mining but not against Essex. Essex was not a party to the interlocutory appeal in the private action and no contention was made here that the difference in parties prevented tolling of limitations as to Minnesota Mining. Minnesota Mining did argue that because of the greater burden of proof under the Sherman Act plaintiff's Sherman Act claims could not be held to be based in part on any matter complained of in the Clayton Act proceeding before the Commission. This Court found that "both suits set up substantially the same claims," 381 U. S., at 323, and rejected Minnesota Mining's argument.

Just as in *Minnesota Mining* the differences between Sherman Act and Clayton Act proceedings were held not to require the conclusion that the private action under the Sherman Act was not based in part on any matter com-

plained of in the Government's § 7 suit, so here we cannot conclude that a private claimant may invoke § 5 (b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. Here there is substantial identity of parties, six of the seven defendants in this case being defendants in the government suit as well. In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net. The overlap in the time periods of the two conspiracies is less complete, but this disparity is equally without significance. That plaintiffs' alleged conspiracy corresponding in time to the period during which they were in business obviously does not mean that this conspiracy is not based in part on matters complained of by the Government. Nor can that conclusion be drawn from the fact that plaintiffs focus on the Southern California area, which is only a part of the Pacific States area with which the Government was concerned.

It is obvious from a comparison of the two complaints that plaintiffs' suit is based in part on matters of which the Government complained. The Government charged

that defendants had conspired to eliminate the competition of independent marketers; plaintiffs charged a conspiracy to eliminate independent jobbers and retailers. Both the plaintiffs and the Government alleged defendants had fixed prices at wholesale and at retail. The Government alleged that defendants had conspired to eliminate the competition of independent refiners by acquiring such refiners, limiting the supply of crude oil available to them, and inducing them to shut down their refining facilities; plaintiffs complained that defendants had denied them a source of supply and prevented them from obtaining gasoline from other sources. To require more detailed duplication of claims would be to resurrect the collateral estoppel approach declared in *Steiner* and rejected by this Court in *Minnesota Mining*.

Defendants contend, however, that during the extensive discovery proceedings that preceded the ruling on the motion to dismiss plaintiffs made certain concessions establishing that, whatever the complaint may allege, plaintiffs' claim in fact is not based at all on any matter complained of by the Government in *Standard Oil*. Plaintiffs' real claim, defendants say, is that they had an arrangement with Olympic Refining Company under which they were to be supplied with gasoline as long as Olympic was in turn supplied by defendant General Petroleum Corporation, that defendant Standard Oil Company of California replaced General Petroleum Corporation as Olympic's supplier in February 1954, and that plaintiffs' supply was thereby terminated. The attorney for plaintiffs stated in a hearing before the trial court that General Petroleum Corporation had the absolute right to terminate its supply to Olympic at any time and that if General had in this case done so unilaterally plaintiffs would not be in court. But plaintiffs contended that defendants conspired together to effect the termination of General's supplier relationship with

Olympic. Defendants argue that this conspiracy to terminate a particular supply contract is far removed from the matters with which the government complaint was concerned.

In general, consideration of the applicability of § 5 (b) must be limited to a comparison of the two complaints on their face. Obviously suspension of the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of its complaint. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 316. Equally, the availability of § 5 (b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits.

Moreover, defendants' argument contains a basic flaw in that it does not take account of all that plaintiffs' counsel said. The relationship between plaintiffs and General was one of subdistributorship, and there were accordingly two levels in the chain of distribution between General and the ultimate retail outlet. Plaintiffs claimed, counsel said, that pressure was exerted to terminate the relationship between General and Olympic, and thereby between Olympic and plaintiffs, as the result of an industry commitment to do away with subdistributorship operations "because the sub-distributorship could not be controlled. The gasoline could be controlled, obviously, when General Petroleum sold it directly at retail. The gasoline could be controlled if you had a good company as opposed to a bad company, which was acting as a distributor. But the gasoline could not be controlled when it went to the sub-distributorship level." Clearly this is a claim that in order to obtain and to maintain control of distribution and retail marketing, including the control and fixing of uniform wholesale and retail

prices of which the government action complained, defendants agreed to tighten control of the chain of distribution through elimination of independent jobbers acting as subdistributors. Counsel's statements simply filled out the details of the general allegations of the complaint.

As we have concluded that the running of the statute of limitations was suspended, the judgment must be

*Reversed.*

MR. JUSTICE HARLAN and MR. JUSTICE FORTAS took no part in the consideration or decision of this case.